THE STATE OF NEW HAMPSHIRE
SUPREME COURT
No. _____

NORTHERN PASS TRANSMISSION LLC AND PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A EVERSOURCE ENERGY

Application for a Certificate of Site and Facility

SEC Docket No. 2015-06

APPEAL OF NORTHERN PASS TRANSMISSION LLC AND PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A EVERSOURCE ENERGY PURSUANT TO RSA 541:6 AND RSA 162-H:11 FROM ORDERS OF THE SEC DATED MARCH 30, 2018 and JULY 12, 2018

Wilbur A. Glahn, III, Bar No. 937
bill.glahn@mclane.com
Barry Needleman, Bar. No. 9446
barry.needleman@mclane.com
Thomas B. Getz, Bar No. 923
Rebecca S. Walkley, Bar No. 266258
Viggo Fish, Bar No. 267579
McLane Middleton, Professional Association
900 Elm Street, P.O. Box 326
Manchester, NH 03105
(603) 625-6464

Robert A. Bersak, Bar No. 10480
robert.bersak@eversource.com
Chief Regulatory Counsel
Public Service Company of New Hampshire
d/b/a Eversource Energy
780 North Commercial Street
Manchester, NH 03101

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a. PARTIES AND COUNSEL

1. Name and Counsel of Parties Seeking Review

Appellants:	**Counsel:**
Northern Pass Transmission LLC and Public Service Company of New Hampshire, d/b/a Eversource Energy 780 N. Commercial Street PO Box 330 Manchester, NH 03105-0330	Wilbur A. Glahn, III Barry Needleman Thomas B. Getz Rebecca S. Walkley Viggo Fish McLane, Middleton, Professional Association 900 Elm Street, Box 326 Manchester, NH 03105-0326 Robert A. Bersak, Chief Regulatory Counsel Public Service Company of New Hampshire d/b/a Eversource Energy 780 North Commercial Street Manchester, NH 03101

2. Names and Addresses of Parties and Counsel

Parties:	**Counsel:**
Counsel for the Public New Hampshire Department of Justice 33 Capitol Street Concord, NH 03301	Christopher G. Aslin Assistant Attorney General Office of the Attorney General 33 Capitol Street Concord, NH 03301 Thomas Pappas Primmer Piper Eggleston & Cramer PC 900 Elm Street Manchester, NH 03105

Parties:	**Counsel:**
	Elijah Emerson Primmer Piper Eggleston & Cramer PC 900 Elm Street Manchester, NH 03105 Doreen Connor Primmer Piper Eggleston & Cramer PC 900 Elm Street Manchester, NH 03105
Town of Pittsburg 1526 Main Street Pittsburg, NH 03592	n/a
Town of Stewartstown P.O. Box 119 Stewartstown, NH 03597	n/a
Town of Clarksville 408 Route 145 Clarksville, NH 03592	n/a
Town of Colebrook 17 Bridge Street Colebrook, NH 03576	n/a
Coos County Commissioner District Three Rick Sampson 804 Piper Hill Road Stewartstown, NH 03576	n/a
Town of Whitefield 56 Littleton Road Whitefield, NH 03598	Christine Fillmore Shawn M. Tanguay Gardner Fulton & Waugh PLLC 78 Bank Street Lebanon, NH 03766

Parties:	**Counsel:**
Whitefield Planning Board 56 Littleton Road Whitefield, NH 03598	Christine Fillmore Shawn M. Tanguay Gardner Fulton & Waugh PLLC 78 Bank Street Lebanon, NH 03766
Town of Dalton 756 Dalton Road Dalton, NH 03598	n/a
Town of Dalton Conservation Commission 756 Dalton Road Dalton, NH 03598	n/a
Town of Bethlehem 2155 Main Street Bethlehem, NH 03574	n/a
Town of Bethlehem Planning Board 2155 Main Street Bethlehem, NH 03574	n/a
Town of Bethlehem Conservation Commission 2155 Main Street Bethlehem, NH 03574	n/a
Town of Northumberland 19 Main Street Groveton, NH 03582	Christine Fillmore Shawn M. Tanguay Gardner Fulton & Waugh PLLC 78 Bank Street Lebanon, NH 03766
Town of Littleton 125 Main Street Littleton, NH 03561	n/a

Parties:	**Counsel:**
Town of Sugar Hill P.O. Box 574 1411 Route 117 Sugar Hill, NH 03586	Christine Fillmore Shawn M. Tanguay Gardner Fulton & Waugh PLLC 78 Bank Street Lebanon, NH 03766
Town of Franconia 421 Main Street P.O. Box 900 Franconia, NH 03580	Christine Fillmore Shawn M. Tanguay Gardner Fulton & Waugh PLLC 78 Bank Street Lebanon, NH 03766
Town of Franconia Planning Board 421 Main Street P.O. Box 900 Franconia, NH 03580	Christine Fillmore Shawn M. Tanguay Gardner Fulton & Waugh PLLC 78 Bank Street Lebanon, NH 03766
Town of Franconia Conservation Commission 421 Main Street P.O. Box 900 Franconia, NH 03580	Christine Fillmore Shawn M. Tanguay Gardner Fulton & Waugh PLLC 78 Bank Street Lebanon, NH 03766
Town of Easton 1060 Easton Valley Road Easton, NH 03580	Christine Fillmore Shawn M. Tanguay Gardner Fulton & Waugh PLLC 78 Bank Street Lebanon, NH 03766
Town of Easton Planning Board 1060 Easton Valley Road Easton, NH 03580	Christine Fillmore Shawn M. Tanguay Gardner Fulton & Waugh PLLC 78 Bank Street Lebanon, NH 03766

Parties:	**Counsel:**
Town of Easton Conservation Commission 1060 Easton Valley Road Easton, NH 03580	Christine Fillmore Shawn M. Tanguay Gardner Fulton & Waugh PLLC 78 Bank Street Lebanon, NH 03766
Town of Plymouth 6 Post Office Square Plymouth, NH 03264	Christine Fillmore Shawn M. Tanguay Gardner Fulton & Waugh PLLC 78 Bank Street Lebanon, NH 03766
Town of Bridgewater 297 Mayhew Turnpike Bridgewater, NH 03222	Mitchell Municipal Group, P.A. Steven Whitley 25 Beacon Street East Laconia, NH 03246
Town of Holderness P.O. Box 203 Holderness, NH 03245	n/a
Town of Holderness Conservation Commission P.O. Box 203 Holderness, NH 03245	n/a
Town of Ashland 20 Highland Street P.O. Box 517 Ashland, NH 03217	n/a
Town of Ashland Conservation Commission 20 Highland Street P.O. Box 517 Ashland, NH 03217	n/a

Parties:	**Counsel:**
Ashland Water & Sewer Department 6 Collins Street Ashland, NH 03217	Mitchell Municipal Group, P.A. Steven Whitley 25 Beacon Street East Laconia, NH 03246
Town of Bristol 230 Lake Street Bristol, NH 03222	Christine Fillmore Shawn M. Tanguay Gardner Fulton & Waugh PLLC 78 Bank Street Lebanon, NH 03766
Town of New Hampton 6 Pinnacle Hill Road New Hampton, NH 03256	Mitchell Municipal Group, P.A. Steven Whitley 25 Beacon Street East Laconia, NH 03246
Town of Canterbury 10 Hackleboro Road P.O. Box 500 Canterbury, NH 03224	n/a
City of Concord 41 Green Street Concord, NH 03301	Danielle Pacik Deputy City Solicitor 41 Green Street Concord, NH 03301
Town of Pembroke 311 Pembroke Street Pembroke, NH 03275	Mitchell Municipal Group, P.A. Steven Whitley 25 Beacon Street East Laconia, NH 03246
Town of Pembroke Planning Board 311 Pembroke Street Pembroke, NH 03275	Mitchell Municipal Group, P.A. Steven Whitley 25 Beacon Street East Laconia, NH 03246
Town of Pembroke Conservation Commission 311 Pembroke Street Pembroke, NH 03275	Mitchell Municipal Group, P.A. Steven Whitley 25 Beacon Street East Laconia, NH 03246

Parties:	**Counsel:**
Town of Deerfield 8 Raymond Road P.O. Box 159 Deerfield, NH 03037	Mitchell Municipal Group, P.A. Steven Whitley 25 Beacon Street East Laconia, NH 03246
Town of Deerfield Conservation Commission 8 Raymond Road P.O. Box 159 Deerfield, NH 03037	Mitchell Municipal Group, P.A. Steven Whitley 25 Beacon Street East Laconia, NH 03246
Grafton County Commissioners 3855 Dartmouth College Highway North Haverhill, NH 03774	Lara Saffo County Attorney 3785 Darmouth College Hwy North Haverill, NH 03774
City of Franklin 316 Central Street Franklin, NH 03235	n/a
City of Berlin 168 Main Street Berlin, NH 03570	Christopher L. Boldt Eric Maher Towle House, Unit 2 164 NH Route 25 Meredith, NH 03253
Society for the Protection of New Hampshire Forests 54 Portsmouth Street Concord, NH 03301	Amy Manzelli Jason Reimers Elizabeth Boepple Stephen Wagner Kelsey C.R. Perterson BCM Environmental & Land Law, PLLC 3 Maple Street Concord, NH 03301
Appalachian Mountain Club 5 Joy Street Boston, MA 02108	William L. Plouffe Drummond Woodsum 84 Marginal Way Portland, ME 04101

Parties:	**Counsel:**
Ammonoosuc Conservation Trust 53 Post Road Sugar Hill, NH 03586	n/a
Conservation Law Foundation 27 North Main Street Concord, NH 03301	Melissa Birchard Conservation Law Foundation 27 North Main Street Concord, NH 03301
New Hampshire Preservation Alliance PO Box 268 Concord, NH 03302	n/a
National Trust for Historic Preservation The Watergate Office Building 2600 Virginia Avenue NW Suite 1100 Washington, DC 20037	Sharee Williamson The Watergate Office Building 2600 Virginia Avenue NW Suite 1100 Washington, DC 20037
Sugar Hill Historical Museum 16 Post Road Sugar Hill, NH 03586	n/a
North Country Scenic Byways Council 16 Post Road Sugar Hill, NH 03586	n/a
Cate Street Capital, Inc. One Cate Street, Suite 100 Portsmouth, NH	n/a
New England Power Generators Association 33 Broad Street, 7th Floor Boston, MA 02109	Bruce F. Anderson 33 Broad Street, 7th Floor Boston, MA 02109

Parties:	**Counsel:**
International Brotherhood of Electrical Workers Brian Murphy 22 Old Concord Turnpike Barrington, NH 03825	Alan Raff Primary Legal Solutions 4 Park Street, Suite 201 Concord, NH 03301
Coos County Business and Employers Group 18 Centre St. Concord, NH 03301	James J. Bianco, Jr. Bianco Professional Association 16 Centre Street Concord, NH 03301 Leigh S. Willey Bianco Professional Association 16 Centre Street Concord, NH 03301
Dixville Capital, LLC and Balsams Resort Holdings, LLC P.O. Box 547 Bethel, ME 04217	Mark E. Beliveau Pierce Atwood LLP One New Hampshire Avenue Suite 350 Portsmouth, NH 03801
Wagner Forest Management, LTD 150 Orford Road, PO Box 160 Lyme, NH 03768	n/a
Pemigewasset River Local Advisory Committee 2110 Summer St Bristol, NH 03222	n/a
Charles and Donna Jordan 647 West Road Clarksville, NH 03592	n/a
Sally Zankowski PO Box 135 Colebrook, NH 03576	n/a

Parties:	**Counsel:**
Jon and Lori Levesque 107 Oak Street Gonic, NH 03839	n/a
Bradley and Daryl Thomson 599 Noyes Road Stewartstown, NH 03576	n/a
Nancy L. Dodge 157 Creampoke Road Stewartstown, NH 03576	n/a
Arlene Placey 944 Bear Rock Road Stewartstown, NH 03576	n/a
Lynne Placey 1043 South Hill Road Stewartstown, NH 03576	n/a
David Schrier 188 High Street Exeter, NH 03833	Alan Robert Baker 481 Meriden Hill Road North Stratford, NH 03590
Robert R. Martin 14 Tower Road Clarksville, NH 03592	n/a
Elliot Martin and Janice Kaufman 714 Bear Rock Road Stewartstown, NH 03576	n/a
John Petrofsky 680 Bear Rock Road Stewartstown, NH 03576	n/a
Roderick Moore, Jr. 43 Sherwood Circle Salem, NH 03079	Alan Robert Baker 481 Meriden Hill Road North Stratford, NH 03590

Parties:	**Counsel:**
Joseph J. Dunlap Windham, NH	Alan Robert Baker 481 Meriden Hill Road North Stratford, NH 03590
Shawn P. Brady Dunbarton, NH	Alan Robert Baker 481 Meriden Hill Road North Stratford, NH 03590
Christopher Thompson Windham, NH	Alan Robert Baker 481 Meriden Hill Road North Stratford, NH 03590
Eric & Margaret Jones John Silver Road Northumberland, NH	n/a
Susan E. Percy 275 Summer Club Road Stark, NH 03582	n/a
Lagaspence Realty Kevin Spencer and Mark Lagasse 161 Sullivan Road Stark, NH 03582-6451	Arthur B. Cunningham PO Box 511 Hopkinton, NH 03229
Robert Heath PO Box 144 76 Potter Road Stark, NH 03582	n/a
Eric & Elaine Olson P.O. Box 252 Rindge, NH 03461	Alan Robert Baker 481 Meriden Hill Road North Stratford, NH 03590
Joshua Olson P.O. Box 252 Rindge, NH 03461	Alan Robert Baker 481 Meriden Hill Road North Stratford, NH 03590

Parties:	**Counsel:**
Rodrigue and Tammy Beland P.O. Box 1447 Waitsfield, VT 05673	Alan Robert Baker 481 Meriden Hill Road North Stratford, NH 03590
Elmer and Claire Lupton 75 Newell Lane Whitefield, NH 03598	n/a
Mary Boone Wellington mary@rosecottagenorth.com	n/a
Bruce and Sondra Brekke 99 Ramble On Road Whitefield NH 03598	n/a
James and Judy Ramsdell 1049 Whitefield Road Dalton, NH 03598	n/a
Charles and Cynthia Hatfield 41 Hatfield Drive Whitefield, NH 03598	n/a
Donald and Betty Gooden 76 Lancaster Rd. Whitefield, NH 03598	n/a
Tim and Brigitte White 72 Lancaster Road Whitefield, NH 03598	n/a
David Van Houten 649 Cherry Valley Rd Bethlehem, NH 03574	n/a
Mark W. Orzeck and Susan Orzeck 90 Ridgeline Drive Westport, MA 02790	n/a

Parties:	**Counsel:**
Richard M. McGinnis 352 North Road Lancaster, NH 03584	n/a
Frederic P. Fitts 22 Knothole Rd. Whitefield, NH 03598	n/a
Gerald and Vivian Roy 178 Forest Lake Road Whitefield, NH 03598	n/a
Edward Piatek 129 Elm Street Whitefield, NH 03598	n/a
Frank and Kate Lombardi 101 Elm St. Whitefield, NH 03598	n/a
Marsha Lombardi 111 Elm Street Whitefield, NH 03598	n/a
Wendy Doran 91 Twin Mountain Rd Whitefield NH 03598	n/a
Alexandra and James Dannis 117 McGinty Road Dalton, NH 03598	n/a
Andrew D. Dodge, Esq. 2 Central Green Winchester, MA 01890	n/a
Joseph Keenan P.O. Box 93 Lancaster, NH 03584	n/a

Parties:	**Counsel:**
Nigel Manley and Judy Ratzel The Rocks Estate 2 Christmas Lane Bethlehem, NH 03574	n/a
Russell and Lydia Cumbee 1719 Easton Road Franconia, NH 03580	n/a
Walter Palmer and Kathryn Ting 1900 Easton Rd. Franconia, NH 03580	n/a
Peter and Mary Grote 1437 Easton Road Franconia, NH 03580	n/a
Paul and Dana O'Hara 68 Church Street Franconia, NH 03580	n/a
Virginia Jeffryes 92 Church St PO Box 577 Franconia, NH 03580	n/a
Ken & Linda Ford 257 Main Street PO Box 728 Franconia, NH 03580	n/a
Campbell McLaren 50 Gibson Road Easton, NH 03580	n/a
Eric and Barbara Meyer 791 Easton Valley Road Easton NH 03580	n/a

Parties:	**Counsel:**
Robert W. Thibault Rt. 116 Easton, NH 03580	n/a
Dennis Ford PO Box 544 1544 Easton Valley Road Easton, NH 03580	n/a
Carl and Barbara Lakes 18 Loop Road Easton, NH 03580	n/a
Bruce Ahern 503 Daniel Webster Highway Plymouth, NH 03264	n/a
Frank Pinter 32 Academy Street Unit 14 PO Box 498 Franconia, NH 03580	n/a
Lee Sullivan and Stephen Buzzell 10 Burnham School Road Arundel, ME 04046	n/a
Timothy and Rebecca Burbank 1178 Easton Road Sugar Hill, NH 03586	n/a
Edward Cenerizio 1288 Easton Road Sugar Hill, NH 03586	n/a
Deborah Corey 1288 Easton Road Sugar Hill, NH 03586	n/a

Parties:	**Counsel:**
Matthew Steele 1161 Easton Road Sugar Hill, NH 03586	n/a
James H Page Jr. 67 South Rd. Deerfield, NH 03037	n/a
Susan Schibanoff P.O. Box 59 Franconia, NH 03580	n/a
Erick and Kathleen Berglund 23 Nottingham Road Deerfield, NH 03037	n/a
Rebecca Hutchinson 30 Lang Road Deerfield, NH 03037	n/a
Torin and Brian Judd 96-A Mount Delight Road Deerfield, NH 03037	n/a
Jo Anne Bradbury 30 Thurston Pond Road Deerfield, NH 03037	n/a
Jeanne Menard Menard Forest Family LP 36 Mountain Road Deerfield, NH 03037	n/a
Kevin Cini 20 Mountain Road Deerfield NH, 03037	n/a
Bruce Adami & Robert Cote 32 Mountain Road Deerfield, NH 03037	n/a

Parties:	**Counsel:**
Eric and Sandra Lahr 11 North Rd. Deerfield, NH 03037	n/a
Carol L. Currier 70 Cedar Lane P.O. Box 34 Ashland, NH 03217	n/a
Mary A. Lee 93 Fiddler's Choice Rd Northfield, NH 03276	n/a
Craig and Corinne Pullen Windswept Farm, LLC 63 Old Schoolhouse Road Canterbury, NH 03224	n/a
Taras W. and Marta M. Kucman 12 Brookwood Drive Concord, NH 03301	n/a
Kelly Normandeau Concord Equestrian Center 56 Sanborn Rd Concord, NH 03301	n/a
Laura M. Bonk 21 Tahanto Street Concord, NH 03301	n/a
Michelle Kleindienst Association Manager McKenna's Purchase Unit Owner's Association kleindienstm@gmail.com	Stephen J. Judge, Esq. Wadleigh, Starr & Peters P.L.L.C 95 Market Street Manchester, NH 03101

Parties:	**Counsel:**
Philip H. Bilodeau Joan C. Bilodeau 140 Nottingham Road Deerfield, NH 03037	Scott E. Hogan The Law Office of Scott E. Hogan P.O. Box 33 Durham, NH 03824
Joanna and Robert Tuveson 105 Sargent Road Holderness, NH 03245	n/a
Elisha Gray 809 Blake Hill Road New Hampton, NH 03256	n/a
Rodney and Laura Felgate 766 Blake Hill Road New Hampton, NH 03256	n/a
Ellen Faran Webster Family 1868 River Road Bridgewater, NH 03264	n/a
Lawrence and Maxine Phillips 23 Mountain View Drive Canterbury, NH 03224	n/a
Lisa Wolford and Pamela Hanglin 14 Church Street Deerfield, NH 03037	n/a
Maureen Quinn 47A Nottingham Road Deerfield, NH 03037	n/a
Madelyn and Thomas Foulkes 26 Nottingham Road Deerfield, NH 03037	n/a

Parties:	Counsel:
Pawtuckaway View, LLC Jeanne Menard 36 Mountain Road Deerfield, NH 03037	n/a

b. ADMINISTRATIVE AGENCY'S ORDERS AND FINDINGS SOUGHT TO BE REVIEWED

This Rule 10 appeal by Northern Pass Transmission LLC ("NPT") and Public Service Company of New Hampshire d/b/a Eversource Energy ("PSNH") (NPT and PSNH are collectively referred to as the "Applicants")[1] pursuant to RSA 541:6 and RSA 162-H:11 is from an order of a Subcommittee of the New Hampshire Site Evaluation Committee (the "SC" and the "SEC") dated March 30, 2018 denying the Applicants' application for a Certificate of Site and Facility (the "Order") and from an Order of the SC dated July 12, 2018 denying the Applicants' Motion for Rehearing (the "RH Order") (collectively, the "Orders").

c. QUESTIONS PRESENTED FOR REVIEW

1. RSA 162-H:16, IV and Site 202.28 require a subcommittee of the SEC to deliberate on and make each of the statutory findings in RSA 162-H:16, IV in order to issue or deny a certificate. Notwithstanding that requirement, the SC considering the Northern Pass Project refused to do so and denied the Certificate after deliberating on only two of the statutory factors.

   Was this unreasonable and unlawful?

2. RSA 162-H:16, IV (b), and Site 301.15 require the SEC to determine whether a proposed energy facility "will not unduly interfere with the orderly development of the region." In past decisions, the SEC has found that "in considering whether a project will unduly interfere with the orderly development of the region, the [SC] must first determine whether such

[1] The Orders refer to the two Applicants in the singular. This Notice will use "Applicants."

interference impacts the entire region, as opposed to a limited number of residences." During its deliberations, SC members expressed confusion over the definition of the "region" it was to consider. In the deliberations and the Orders, the SC never resolved that confusion, never defined the "region" it was evaluating (or any of the other terms in RSA 162-H:16, IV (b) or the SEC rules), and found that it had no obligation to do so. The SC nevertheless found that the Applicants failed to meet their burden to demonstrate by a preponderance of the evidence that the Project would not unduly interfere with the orderly development of the region.

Was this unreasonable and unlawful?

3. Neither RSA 162-H:16 nor the SEC rules define "undue interference with the orderly development of the region," or describe the manner in which the SEC is to reach a determination regarding those vague terms. Statutes and rules are unduly or impermissibly vague and thus violate due process if, as applied, they fail to provide the average person with a reasonable understanding as to what the law requires, or if they authorize or allow for arbitrary enforcement. In its deliberations and its Orders, the SC provided no definition to the vague standards in RSA 162-H:16, IV and the SEC rules, failed to identify any objective evidence to support its conclusion that the Applicants had failed to meet their burden of proof relative to these vague, undefined standards, and applied erroneous and purely arbitrary standards in finding that Applicants had not met their burden of proof. As examples of this arbitrary decision-making, the SC:

   a. Imposed on Applicants an obligation to meet a burden of proof as to each of the elements in Site 301.09, notwithstanding that the Applicants had no such burden under RSA 162-H:16 or the SEC rules.

   b. Failed to explain how the elements of Site 301.09 were considered in determining whether the Applicants had met their burden of proof regarding undue interference with the orderly development of the region.

   c. Evaluated the Applicants' burden of proof against improper standards, standards that the SC never defined, that appear nowhere in the statute or SEC rules, that were created and applied on an ad hoc basis solely for this proceeding, that are contrary to the statutory standard of "undue interference," or that are impossible to meet.

   d. Failed to follow its own precedent established in prior decisions of the SEC (and that had provided guidance as to the meaning of SEC

rules) without providing a reasoned explanation for disregarding that precedent.

e. Imposed detailed requirements on the Applicants' proof—and in particular on the type of proof provided or the methodology used by the Applicants experts—notwithstanding that the SEC rules contain no such requirements, and that the SEC had accepted and relied upon substantially similar reports from the same experts in prior SEC dockets;

f. Found that the Applicants failed to meet their burden of proof regarding the effect of the Project on orderly development of the region without considering relevant evidence establishing that the alleged impacts or effects were negligible or immaterial.

g. During its deliberations, found that Applicants failed to meet their burden of proof as to whether the Project unduly interfered with the orderly development of the region without providing any factual findings as to why the Applicants' proof failed to meet that standard in violation of RSA 91-A:2 and RSA 541-A:35.

h. Found that temporary construction in 4.5 miles of unpaved roads unduly interfered with the orderly development of the region.

Was this unreasonable and unlawful?

4. An application submitted for approval of a certificate of site and facility under RSA chapter 162-H is part of a permitting process under which the SEC must give "due consideration" to all relevant information." In such proceedings, the inclusion of conditions or other mitigation to address the impact of an energy project is an integral and essential part of an applicant's burden of proof. The SEC has previously ruled that in considering whether a project "unduly interferes with the orderly development of the region," it "must consider whether the degree of such interference is so excessive that it warrants mitigation or denial of the certificate." In this docket, the SC Required the Applicants to meet their burden of proof regarding the extent to which the Project would affect land use, employment and the economy independent from, and without any consideration of, conditions or other migration to address or eliminate any such effect (and thus allow the Applicants to meet their burden) and concluded that it had no obligation to consider such conditions.

Was this unreasonable and unlawful?

5. RSA 162-H:16, IV requires that the SEC give "due consideration" to "all relevant information . . . including potential significant impacts and benefits" when addressing any of the factors in that statute, including "undue interference with orderly development." Despite these requirements, the SC:

   a. Failed to weigh any of the potential benefits of the Project against potential significant impacts; and

   b. Failed to consider evidence in the record demonstrating the extent of the positive effect of the Project on orderly development, and assessed the Applicants' alleged failure to meet its burden of proof without consideration of that evidence.

   Was this unreasonable and unlawful?

d. PROVISIONS OF CONSTITUTION, STATUTES, ORDINANCES, RULES AND REGULATIONS

The constitutional provisions, statutes and rules involved in this case, which are included in Addendum "A" to this Notice of Appeal, are as follows: Part, I Articles 12 and 15 of the New Hampshire Constitution; RSA chapter 91-A; RSA 91-A:2; RSA chapter 162-H, RSA 162-H:1; RSA 162-H:7; RSA 162-H:7-a, I; RSA 162-H-10, VII; RSA 162-H:16, IV (a)-(c), (e); RSA 541:6; RSA 541-A:22; and RSA 541-A:35; Site 202.19; Site 202.28; Site 301.01-18; Site 301.05; Site 301.7; Site 301.8; Site 301.09; Site 301.13; Site 301.14 and 301.15.

e. PROVISIONS OF INSURANCE POLICIES, CONTRACTS OR OTHER DOCUMENTS

Not applicable. A separate table of contents in set out in the Appendix to this Notice of Appeal. The Appendix contains the documents cited in this Notice.

f. STATEMENT OF THE CASE

1. The Project[2]

The Applicants filed a Joint Application for a Certificate of Site and Facility (the "Application") on October 19, 2015.[3] As described in the Application, the "Northern Pass" project (the "Project") was to transmit 1,090 MW of clean renewable electricity generated by hydroelectric facilities operated by Hydro-Québec, a crown corporation owned by the Province of Québec.[4] The Applicants proposed to construct and operate a 192-mile electric transmission line between the Canadian border in Pittsburg, New Hampshire and a substation in Deerfield, New Hampshire, where the electricity would enter the regional electric grid.[5]

As described in the Application, the Project would provide over $3 billion in economic stimulus in the State by reducing the electricity costs of New Hampshire customers by more than $60 million annually, produce more than 2,600 New Hampshire jobs at the peak of construction, generate an estimated $600 million in local, county and State tax revenues over the first 20 years of operation, establish a $200 million Forward

[2] As referenced in this Notice of Appeal, documents will be cited as follows (with appropriate references to the page number of the Appendix): the Appendix-"A.___;" the Hearing Transcript-"HT;" the transcript of the deliberations of January and February 2018, "DT,"'; the deliberations on rehearing on May 24, "RDT;" the Applicants' first Motion for Rehearing of February 28th, "1st RHM;" Applicants' second Motion for Rehearing of April 28th "2nd RHM;" the Applicants' Post Hearing Memorandum of January 19th, "PHM." As noted, the Order of March 30th will be cited as the "Order," and the Order on Rehearing of July 12th will be cited as the "RH Order."

[3] The Application comprised thirty-seven volumes of approximately 27,500 pages.

[4] The Project is described in detail in the Order. A. 22-28.

[5] Approximately 100 miles of the 192 mile transmission line was to be constructed in existing transmission rights-of-way, with another approximately 60 miles to be installed underground in public highways, resulting in approximately 83 percent of the Project being constructed in either an existing right-of-way or underground. Varney Report A. 2464. The remaining 32 miles were to be constructed in a new right-of-way leased by the Applicants from Bayroot, LLC and 8 miles of which was to cross forest and agricultural land leased by NPT from and affiliate that purchased the land. Varney Testimony A. 2501.

NH Fund ("Fund") to support community betterment, economic development, clean energy and tourism, sponsor the $7.5 million North Country Job Creation Fund, and partner with the National Fish and Wildlife Foundation to restore and sustain healthy forests and rivers in New Hampshire. PHM A. 2160.[6] The Fund was focused on providing assistance to host communities, particularly those in the North Country. Quinlan Testimony A. 2618.

2. The Proceedings

On December 18, 2015, the SC accepted the Application pursuant to RSA 162-H:7, finding that it contained sufficient information to carry out the purposes of the statute. Order A. 17. It then received more than 160 petitions to intervene. Order A. 17-18.[7] Between January and October 2016, the Applicants held five public information sessions, and the SC held seven public hearings in the counties where the Project was to be located. The SC also conducted seven days of site visits. *Id.* A. 18.

Discovery commenced in May 2016 and continued through March 2017. Twenty-one days of technical sessions were held for questioning the Applicants' witnesses and thousands of discovery requests propounded on the Applicants. Seventy days of adjudicative hearings commenced in April and continued through December 2017, with

[6] The SC later ordered the Applicants to revise their economic analysis of the electricity market benefits resulting from the Project to account for changes in electricity market rules implemented after the Application was filed. Although not within the scope of the SC order, as part of her testimony the Applicant's expert, Ms. Julia Frayer, also updated her estimates of GDP and employment growth during the Project's operations. Even with those revisions, and assuming the most conservative view of the benefits specifically recognized by the SC in the Order, the Project would create approximately $600 million in economic benefits in addition to substantial employment gains.

[7] The parties opposing the Project, which included property owners, municipalities and non-governmental agencies, were granted intervention individually or combined into groups. Order A. 34-50.

forty-three days devoted to cross examination of the Applicants' witnesses.[8] The SC heard testimony from 154 witnesses. Post-hearing memoranda were filed in January 2018.

3. The Deliberations

RSA 162-H:16, IV (supp. 2017)[9] and the SEC rules, Site 301.01-301.18, set out the required findings that the SEC must make in deciding an application. Here, the Orders were primarily based on the criterion at issue in RSA 162-H:16, IV(b) and in two of these rules, Site 301.15 and Site 301.09, namely, whether the Project will "unduly interfere with the orderly development of the region" ("ODR").

At the start of deliberations on January 30, 2018, the SC considered the first criterion under RSA 162-H:16, IV(a), *i.e.* whether the Applicants had the financial, technical and managerial capability to construct and operate the Project in compliance with the requirements of a Certificate. A. 843. There was no vote; instead, the Chairman summarized the SC members' consensus that the Applicants appeared to have satisfied this criterion, subject to the need to develop and adopt related conditions. DT A. 928-930.

The SC then deliberated the ODR criterion during the remainder of day one and through the afternoon of day two. Mr. Way led the discussion, with SC members expressing their views and commenting on evidence. On the morning of day three, February 1st, the Chairman said:

[8] Applications filed with the SEC are to be ruled on within a year. Here, the SC extended the deadline several times, with hearings beginning 19 months after the Application was filed and concluding 26 months after that filing.
[9] All references to the statute are to the 2017 Supplement.

> I do not have any sense of where the Subcommittee is on "undue interference with the orderly development of the region,' and so what we are going to do is ask people where they think they are on this. There's no motion. There's no vote right now. But we're going to ask people to say where they are as a way of bringing the discussion about orderly development to a close.

A. 1483. The discussion on this issue—which was the basis for denying the Application—lasted approximately 40 minutes. A. 1484-1511.

Chairman Honigberg then stated: "[w]e're going to continue the discussion of all of the rest of the Application and the other elements. And until a vote is taken, everything is open for discussion. But that's where we are right now." A. 1511. However, after starting to deliberate on the next criterion and then taking a lunch break, Commissioner Bailey moved to deny the Application based on the failure of the Applicants to meet their burden of proof on ODR. A. 1575. Although recognizing that "[b]y statute…we have to make four findings in order to grant the Certificate," she said that "it may be better for us just to stop now." A. 1576.

Following this motion, Ms. Dandeneau expressed "concern about doing diligence to the rest of the information we've had presented before us over the course of 70 days of hearings." A. 1577. Ms. Weathersby was more direct:

> I'd love to be done. I think everyone here would love to have this – a final decision on this. But the lawyer in me says we should be sure to dot all our i's and cross all our t's…dot our i's and cross our t's. And we have heard a lot of information over the past 70 days, we've read a ton of reports, we've got everybody's briefs. There's been a lot of work. And I think it's worth considering all of the different arguments on all of the different factors. I think that this Committee can do a good and thorough job. And we've made good progress in deliberations. It's gone quicker than I think, I know, more quickly than I thought it would go. And that, if – I don't know what – <u>if expediency is at all a rationale for stopping now</u>, I think that without too many more days we can be done and have addressed all of the topics.

A. 1578-1579 (emphasis added).[10] Commissioner Bailey responded that she saw "some risks in continuing deliberations," stating:

> I think I'm coming at it from an engineering perspective, you're coming at it from a legal perspective. And I appreciate the difference, I really do. But, as an engineer, I look at things from a more practical matter than from a legal matter. And I'm worried that if we continue with our deliberations, we will really need to figure out what conditions we would impose on a lot of things. And that's not—that's not going to be simple and it's not going to be fast. And there's going to be a lot more things to appeal. And I think we have a pretty good record right now. So because I'm not a lawyer, I lean a little bit more toward let's just keep it simple and stop here.

A. 1580 (emphasis added).

Commissioner Bailey's view prevailed. By a 5-2 vote, the SC ended deliberations, with both lawyers (Chairman Honigberg and Ms. Weathersby) dissenting. A. 1595-1596.[11] Then, without making any findings of fact or otherwise describing the reasons for its collective decision, the SC voted unanimously to deny the Application.

4. The Applicants' First Motion for Rehearing

On February 28, 2018, the Applicants moved for rehearing of the February 1st decision[12] to end deliberations and deny the Application, arguing that the SC: (1) failed to

[10] Director Wright also indicated concerns over halting deliberations stating: "I'm really, really conflicted on this, to be honest with you. On one hand, I can hear Bill Belichick telling me to 'do my job and finish what you started.' But, also, I'm an engineer, too. I'm a realist. We essentially have a four-legged stool, instead of the proverbial three-legged stool, and we know, as of this morning, I think we all know how we feel on at least one of those legs. And you need four legs to stand up in this case. And I guess I'm really conflicted right now by the two of those things. But I would love to hear further discussion." A. 1580-1581.

[11] Chairman Honigberg also noted differing rationales for ending deliberations or continuing: "I'll offer up that I am of two minds about this. As a lawyer, I understand and fully agree with Ms. Weathersby's view that the best time to do something is when it's freshest in your mind to go through all of the issues. There's another part, another part of the lawyer in me, however, that recognizes the simplicity or complexity of this appeal is affected by how long the decision is and how many decisions have been made…Just dealing with the issue as it stands now, that's a much simpler case to bring to the Supreme Court." A. 1585-1586.

[12] Given concerns that the oral decision was a final decision that might require a motion for rehearing, the Applicants filed a motion for rehearing within thirty days of that decision. Following issuance of the written decision, the Applicants filed a renewed motion.

deliberate on all of the statutory factors in RSA 162-H:16, IV in violation of that statute and the SEC's rules; (2) failed to consider potential mitigating conditions—an integral element of the burden of proof in permitting proceedings; (3) applied improper standards in its determination that the Applicants had not met their burden of proof and failed to define critical terms when ruling on that burden; and (4) misapplied its own rules by imposing a burden of proof on each of the components in Site 301.09 while also failing to explain how those components related to the ODR finding.

The SC suspended its oral decision on March 13, 2018, and issued the Order on March 30, 2018.

5. The Order

The SC's 287 page Order concludes as follows:

> Based on the testimony and evidence presented, and after due consideration has been given to the views of municipal and regional planning commissions and regional bodies, we find that the Applicant failed to carry its burden of proof and failed to demonstrate by a preponderance of the evidence that the Project would not unduly interfere with the orderly development of the region.

A. 293.[13]

While "acknowledg[ing] that the Project would have a somewhat positive effect on the regional economy, employment and real estate taxes,"[14] (and thus, by definition, would seem not to unduly interfere with ODR) the SC's denial rests principally on the

[13] Although spanning 287 pages, less than five percent of the Order is devoted to the SC's actual deliberations and findings on the ten elements in Site 301.09. Notably, the Order does not even mention two of the elements of the rule on which the SC relies for its findings, specifically Site 301.09(b)(1) and 301.09(b)(6).

[14] The SC in its RH Order suggests that the Applicants did not meet their burden of proof as to the effect of the Project on employment, a suggestion that is contrary to the finding in the Order. A. 329. If the SC was reversing its prior findings, it should have been clear on that issue.

Applicants' alleged failure to meet their burden of proof relative to three elements of Site 301.09, namely, land use, tourism and property values. Order A. 292-293. Despite discussing the "positive effects" of the "economic analysis" in one paragraph of its conclusion, the SC did not weigh or balance those effects in making its determination. A. 292. Moreover, the SC never defined—or even mentioned—the "region" it was considering, never assessed the impact of the Project on "development" in the "region" and never explained what it considered to be "undue interference."

The Order included six findings on burden of proof. These findings addressed: the "wholesale electricity market savings and various effects on economy," tourism, property values, land use, construction, and municipal views. For each statutory criterion the Order sets out the "position of the parties," and then discusses the SC's conclusions.

The SC's finding on the "wholesale electricity market savings and various effects on economy," is as follows:

> Considering that there is no disagreement that the Project would generate energy savings, we agree that the Project would have a small, but, positive impact on the economy although a much less significant impact than that predicted by the Applicant.
>
> In the overall analysis of impact on the economy, savings from the Capacity Market could be outcome determinative, because those savings are the primary driver of induced jobs and economic growth in the model used by Ms. Frayer . . . Based on the record before us, and the Applicant's admission that qualifying and clearing the Capacity Market is merely an intellectual exercise, we cannot conclude there will be savings from the Capacity Market.

Order A. 169 (emphasis added). Based on this alleged "admission," the SC undertook no analysis of the evidence presented by the Applicants' expert or the opposing experts on

the capacity market issue, and did not weigh any of the evidence that it conceded could be "outcome determinative."

The SC's findings on tourism are as follows:

> Intervenors in this docket brought a worthwhile view and assessment of the impact that the Project may have on tourism in the region. While they did not provide any analysis or scientific evidence to substantiate their opinions, it was not their responsibility to establish that the Project would affect tourism. The Applicant shoulders the burden of proof. With respect to tourism we cannot conclude the Applicant has met that burden. At best, we are no better off than we were before the evidentiary hearing. The Project may have a negative impact on tourism or it may not, although there are valid reasons to believe that the Project would hurt tourism if it were built.

Order A. 234-235 (emphasis added).

> Regarding tourism, we did not find the Applicant's witness regarding the effects of the Project to be credible. His report and his testimony provided us with no way to evaluate the Project's tourism effects and no way to fashion conditions that might mitigate those effects.

A. 292-293 (emphasis added). The SC made no factual findings supporting these "valid reasons," or describe how "hurting" tourism was relevant to "undue interference" with ODR.

Concerning property values, the SC found:

> While Dr. Chalmers' approach was broad, the Subcommittee finds the report and testimony to be insufficient to demonstrate that the Project will not have an unreasonably adverse impact on real estate values throughout the region.
>
> . . . .
>
> Dr. Chalmers' New Hampshire case study analysis did not persuade us that there would be no discernible decrease in property values attributable to the Project.
>
> . . . .
>
> Dr. Chalmers presents no cogent explanation why properties beyond 100 feet from the right-of-way that experience a significant change of view would not suffer a drop in value as a result of the Project.

. . . .

> The impact on property values is one component of our orderly development consideration. The Applicant did not meet its burden in demonstrating that the Project's impact on property values will not unduly interfere with the orderly development of the region.

A. 202, 203, 205, 207 (emphasis added). None of the emphasized terms appear in the RSA 162-H:16, IV, Site 301.09 or 301.15.

The SC's land use findings are as follows:

> Over-development of an existing transmission corridor can impact land uses in the area of the corridor and unduly interfere with the orderly development of the region . . . . Unsightly transmission corridors or infrastructure within corridors can impact real estate development in the surrounding area…A highly developed corridor may discourage use of the corridor and surrounding lands for recreational purposes.

. . . .

> Regarding land use, the Applicant failed to demonstrate by a preponderance of evidence that the Project would not overburden existing land uses within and surrounding the right-of-way and would not substantially change the impact of the right-of-way on surrounding properties and land use.

A. 286, 293 (emphasis added). Again, none of the emphasized terms appear in RSA 162-H:16, IV or the SEC's rules, nor did the SC identify any evidence to support its speculation that adding transmission lines to an existing right-of-way "can" or "may" "impact" land use.

The SC's separate findings on municipal views were included with land use.

> We agree with the municipalities in this case that, given the magnitude of this Project, more consideration of the provisions of master plans and ordinances was required . . . . Given the nature of the master plans and local ordinances along the Project's route, the Project would have a large and negative impact on land uses in many communities that make up the region affected by the Project.

. . . .

> In considering municipal views, we are not required to give deference. Here, the views expressed by the intervening municipalities, and the comments expressed by local and regional planning agencies, the town meeting warrant articles, and other municipal comments were relevant to the issues, thoughtful and consistent. The overwhelming majority of those views were vehemently opposed to the Project.

A. 289, 293 (emphasis added). The Order does not explain what "more consideration" should have been given, what evidence established this "large and negative impact," where this impact allegedly occurred, or what evidence there was of undue interference with development (let alone "orderly development") of any defined region.

The Order also contained separate findings about construction, treating this issue as a separate criterion under Site 301.15 on which the SC had never deliberated. Under this heading, the SC said that it was "concerned that inadequate traffic management strategies…may have an unreasonable impact on certain communities." A. 127.

Finally, although the Applicants had offered conditions to mitigate or alleviate the potential effects of the Project, the Order failed to consider any of those conditions.[15] Instead, as discussed below, the SC found that because the Applicants' proof was deficient, it had "no way to evaluate" the potential effects and no way to fashion conditions that might mitigate them. Order A. 292-293. In reaching that conclusion, the SC ignored other relevant evidence in the record concerning the effects of the Project.

[15] In fact, during deliberations on the motions for rehearing, the SC struck the proposed conditions, claiming that they were offered after the record was closed. A. 1678-1682. Taken to its logical conclusion, this would mean that no one—including the SEC and opponents who sought to impose restrictive conditions—could propose conditions after the record closed.

6. Renewed Motion for Rehearing

On April 28, 2018, the Applicants filed a renewed Motion for Rehearing of the written Order challenging the SC's failure to deliberate, to consider mitigating conditions, and to provide definition or clarity to otherwise vague statutes and rules while basing its decision on vague, undefined standards that appear nowhere in the statute or rules.[16] The Motion also argued that the SC had: (a) improperly required the Applicants to meet a burden of proof relative to each of the elements of Site 301.09, (b) failed to explain how its findings regarding Site 301.09 related to the burden of proof on ODR, (c) departed from past precedent without explanation, (d) required the Applicants' experts to adhere to methodologies the SC had never before required, (e) failed to consider "all relevant information" regarding the effects of the Project, and (f) violated RSA chapter 91-A by including findings in the written Order that were not made during its deliberations. A. 557-629. CFP and several intervenors filed objections. A. 666-807.

7. Deliberations on Rehearing

The SC deliberated on the Applicants' Motion for less than two hours on May 24, 2018. A. 1603-1695. As to the argument that it failed to deliberate on all of the factors in RSA 162-H:16, IV, Chairman Honigberg stated that "while it was probably a better administrative practice to continue deliberations, the statute does not require the continuation of deliberations" where a certificate is being denied, as opposed to granted. RDT A. 1618. Ironically, Commissioner Bailey, who originally moved to stop

[16] The two motions for rehearing will be referred to as the "Motion," with cites to the appropriate motion.

deliberations, changed her mind, stating: "a reasonable person might read the plain meaning of the rule [Site 202.28] to require us to consider all four criteria stated in the law." *Id.* A. 1701-1702. Commissioner Bailey went on to say "I think, in the interest of fairness, we probably should go through each one of the criteria in the statute. And I think it would be reasonable to go through all of the findings required in the statute." A. 1622. Mr. Wright also changed his mind, noting prior instances in which subcommittees had continued deliberations despite believing that a certificate could not be issued. A. 1623. The SC nevertheless denied the motion on this issue by a vote of 5-2, this time with Commissioner Bailey and Mr. Wright dissenting. A. 1702.

As to the Applicants' other arguments, the SC members stated that they: had no obligation to consider potentially mitigating conditions where the Applicants had not provided sufficient information for them to do so, A. 1624, 1634-1646; had no obligation to define terms in the statute or their rules, which they now found to be clear, A. 1651-1656; and had applied the proper standards in denying the Application. A. 1657-1660. The SC concluded that its specific findings regarding the burden of proof were correct, and voted unanimously to deny the Motion. A. 1662-1680, 1771.

8. Order on Rehearing

The SC's RH Order rejected each of the Applicants' arguments, affirmed the Order and failed to clarify any findings.

Starting with its failure to deliberate on each of the statutory factors, the SC interprets RSA 162-H:16, IV as requiring it to deliberate only when it is granting, rather than denying a certificate. RH Order A. 306-308. The SC reads the word "criteria" in

Site 202.28, which provides that it must "make a finding regarding the criteria stated in RSA 162-H:16, IV and Site 301.13 through 301.17; and (ii) issue an order . . . issuing or denying a certificate," as singular, concluding that the rule does not require a "finding regarding each of the criteria, or that it must continue deliberations after it determines that the Certificate cannot be issued." A. 307 (emphasis in original).

Consistent with its failure to deliberate—and Commissioner Bailey's comment that continued deliberations might require consideration of conditions—the RH Order rejects the Applicants' argument that consideration of conditions that would mitigate "undue interference" or "unreasonable adverse effects" is an integral component of the burden of proof. 2nd RHM A. 568-569. The SC mischaracterizes this argument as a claim that it must "draft and consider conditions that could cure the Applicants' failure to carry its burden of proof," thereby leading to an "absurd result" in which the SC, having found that a certificate cannot be issued, must nevertheless continue deliberations to determine if proposed mitigation "would render a project certifiable." RH Order A. 316. In the SC's view, the burden of proof concerning a project's effect is entirely divorced from, or independent of, any conditions that might mitigate that effect. Conditions thus become relevant only when the SC is prepared to issue a certificate (a concept that is inherently at odds with all State permitting programs).

In response to the argument that the Order was based on vague and undefined standards that appear nowhere in the statute or SEC rules, the SC simply asserts that no clarity is necessary. *Id.* A. 323-330. The SC recognizes that an applicant is entitled to "reasonable notice ... to form an understanding as to what the law requires," that

specificity in otherwise vague rules may be provided "in the context of related statutes, prior decisions, or generally accepted usage" and concedes that "the Applicant[s] [are] correct that the [SC] cannot deny the Application on an *ad hoc* basis based on some vague, unarticulated concerns." *Id.* A. 318, 326. In spite of this recognition and concession, the RH Order fails to define, or even attempt to define, key terms such as the "region" against which the SC measured the burden of proof. Instead, it sets out the terms of the statute and rules (at length) and then asserts that their plain language provides sufficient notice to an applicant of what the SC would consider. According to the SC, the statute and rules "provided the Applicant with a reasonable opportunity to know . . . the standard…[and] information that would be considered." A.325. In the SC's view, simply repeating the language of the statute and regulation is enough, as if by sheer repetition their meaning becomes clear. A. 318-327.[17]

The SC rejects the Applicants' argument that it applied *ad hoc* and arbitrary standards untethered from the statute and rules, finding that the members did not measure the burden of proof by requiring the demonstration of "no negative impact" or some "positive impact." A. 333-334. It asserts that these were simply opinions about the credibility of the Applicants' reports or about the Applicants failure to provide sufficient

[17] Contrary to the SC's assertion that standards in the statute and rules are clear, the RH Order cites Chairman Honigberg's statement that "[o]rderly development of the region is a many-headed animal. There's a lot of different parts to it." A. 327. Nowhere in the Order, or in the RH Order, is there any effort to explain how the SC actually applied this "many-headed animal," or applied terms like "the region" when evaluating the Applicants' burden.

information to determine "the extent of the impact." A. 334. In fact, they did measure the burden using these measures.[18]

Regarding the argument that the Order applied *ad hoc* standards concerning land use, including "overburdening," a "tipping point," and zoning law, the SC states that it "did not find that the Project would have a negative impact on land use because it would overburden the use of the right-of-way," but only that because overburdening was "possible," the Applicants had failed to provide "sufficient credible evidence" to determine whether that "possible" overburdening had occurred. RH Order A. 335. But two sentences earlier, it claims to have "received substantial testimony and evidence that the Project, due to its size and scope, would intensify and overburden the right-of-way to the extent that it would render it inconsistent with existing land uses in the region." *Id*. Moreover, the Order made a specific finding as to whether the Project would "overburden" the right-of-way, a standard that appears nowhere in SEC rules.[19]

Addressing the Applicants' argument that the SC erred by failing to follow past precedent that would have provided clarity to its determination on land use, the SC acknowledges that in prior dockets "it considered construction of a transmission line within an existing right-of-way to be a sound planning principle," but concludes that it did not act unreasonably, because such construction "*may* be inconsistent with land use."

[18] In fact, the RH Order describes the Applicants' failure in relation to the very standards it claims were "personal opinions." Describing the impact of the Project on the economy and employment, it states the SC "determined that the Applicant's assessment" of those impacts "failed to account for the negative impacts on local businesses and employment." A. 329. Nothing in the statute or rules requires applicants to demonstrate no "negative impact," let alone no such impact on specific businesses—as opposed to undue interference with the "region."

[19] The RH Order makes no attempt to explain the standards it applied to measure the Applicants' burden on property values and tourism. It states only that it "did not apply new standards." A. 336.

RH Order A. 343, 346 (emphasis added). Although parties allege that the SC "provided a reasonable explanation as to why this principle was not applicable to the Project," the SC offers no such explanation, nor does it attempt to justify its arbitrary departure from its long-standing precedent. A. 343. Instead, it suggests that the Applicants relied on past precedent to their detriment. A. 346.

The Order was highly critical of the methodology used by Applicants' experts to assess the effects of the Project on land use (Robert Varney) and property values (James Chalmers). A. 171-185, 239-253. Yet a prior SEC subcommittee had accepted substantively the same reports from these experts just two years ago. The SC does not attempt to explain why methods acceptable two years ago, were not acceptable here. *See* discussion in Section 4(b) below.

The RH Order finds that the Applicants' proof regarding tourism was deficient because the Applicants' expert, Mr. Nichols, did not demonstrate knowledge of North Country tourism attractions, failed to consider construction impacts on tourism, and based his opinion on "poorly designed listening sessions and a dubious online survey." A. 358. In response to the argument that the SC had completely ignored relevant evidence provided by the expert for CFP demonstrating that the Project's effect on tourism would be negligible, the RH Order is silent.

Finally, the SC rejected the Applicants' position on the relationship between the public meeting requirements of RSA 91-A:2 and the requirement under RSA 541-A:35 that an agency make findings of fact and conclusions of law. RH Order A. 340, 361. It states that: "Each and every finding included in the Decision was discussed and

deliberated by the Subcommittee members in open public sessions." RH Order A. 341. However, the SC made no findings of fact in its oral deliberations.

Based on the foregoing, the SC denied the Motions. This appeal followed.

g. JURISDICTIONAL BASIS FOR APPEAL

RSA 541:6 and RSA 162-H:11 supply the jurisdictional basis for this appeal.

h. A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION ON THE CORRECT INTERPRETATION OF MULTIPLE STATUTES. THE ACCEPTANCE OF THE APPEAL WOULD PROVIDE AN OPPORTUNITY TO CORRECT PLAIN ERRORS BY THE COMMISSION, CORRECTLY INTERTPRET A LAW OF IMPORTANCE TO THE CITIZENS OF NEW HAMPSHIRE, AND CLARIFY AN ISSUE OF GENERAL IMPORTANCE IN THE ADMINISTRATION OF JUSTICE.

This case presents an opportunity for this Court to address and clarify the standards under which SEC applications are to be judged and to resolve an important issue for the citizens of this State. If allowed to stand, the Orders will erect major obstacles to the siting of new energy projects in this State, as the process becomes a popularity contest instead of one bound by the rule of law. Yet, as this Court recently recognized, as early as 1996 the Legislature found that New Hampshire had some of the highest electric rates in the nation. Appeal of Algonquin Natural Gas Transmission, LLC, Appeal of Public Service Company of New Hampshire d/b/a Eversource Energy, 186 A.3d 865 (May 22, 2018). In the very statute at issue here, the Legislature has declared that undue delay in the construction of new energy facilities should be avoided because of their importance to "the welfare of the population, private property, the location and growth of industry [and] the overall economic growth of the state." RSA 162-H:1.

The SC's failure to complete its deliberations was just the first of a panoply of arbitrary and capricious decisions. In the Orders, the SC: (1) judges the Applicants' burden of proof against wholly subjective criteria or standards that appear nowhere in—or are contrary to—SEC rules, and that were adopted on an *ad ho*c basis for this proceeding; (2) evaluates the burden of proof using new and entirely arbitrary and unreasonable methodologies and without resort to rulemaking; (3) departs from past precedent without a reasoned explanation for doing so; (4) ignores relevant information contrary to RSA 162-H:16; and (5) departs from statutory requirements and past practice by refusing to consider mitigating conditions that could—and would—address potential impacts or interference. The result is a wholly unreasonable and unlawful decision.

Any reasonable applicant would conclude from these Orders that it is simply not worth the enormous investment or risk to pursue an energy project in this State when the SEC may vote "no" based on *ad hoc* standards, applied without definition or any objective basis, and on a process that even this SC conceded is "subjective." RHD, A. 1656. That same applicant would have no way of knowing whether the SEC would follow past precedent, would consider all the evidence, or would be swayed by the "vehemently" opposed intervenors. Order, A. 293. And the applicant could not predict whether, as in this case, after 70 days of hearings, more than a hundred witnesses and millions of pages of documents, the SEC might fail to consider all of the statutory factors or address mitigating conditions that would have alleviated a project's impact.

This is the clear case in which an agency's decision is so far outside the bounds of reasonableness that it calls out for a reversal by this Court. Unless this Court accepts this

appeal and reverses the Orders, no energy developer will ever have confidence that the SEC will fairly evaluate an application. As a result, developers will be deeply reluctant to invest resources in this State, to the detriment of its citizens and in contravention of the clear energy policy goals established by the Legislature.

1. The SC's Failure to Deliberate On All Statutory Findings Was Unlawful and Unreasonable

The SC's errors begin with its decision to end deliberations after only nine hours (of twelve scheduled days of deliberation) and after considering only two of the four statutory prerequisites for issuing a Certificate. RSA 162-H:16, IV (a)-(c), (e). This decision was based on expediency, and concerns that if the SC deliberated further, it might be required to consider conditions. Those conditions could have resulted in the issuance of Certificate. The Order did not address the SC's failure to deliberate, however, the RH Order finds, based on the SC's reading of RSA 162-H:16, IV, that deliberation on all statutory findings is required only when the SC decides that each finding has been met. A. 306-308.

This Court reviews "an agency's interpretation of a statute *de novo.*" Appeal of Old Dutch Mustard Co., Inc., 166 N.H. 501, 506 (2014). In doing so, it looks to legislative intent as expressed in the words of the statute considered as a whole, "in the context of the overall statutory scheme and not in isolation." In the Matter of Watterworth & Watterworth, 149 N.H. 442, 445 (2003); *citing* In the Matter of Coderre & Coderre, 148 N.H. 401, 403 (2002). Here, RSA chapter 162-H and the SEC rules demonstrate that the SC's decision was unlawful and unreasonable.

RSA 162-H:16, IV, before setting out the required findings, states:

> After due consideration of all relevant information regarding the potential siting or routes of a proposed energy facility, including potential significant impacts and benefits, the site evaluation committee shall determine if issuance of a certificate will serve the objectives of this chapter. In order to issue a certificate, the committee shall find that:

(Emphasis added). The SC focused on the statutory language "in order to issue a certificate," arguing that the SC is entitled to deference, yet ignores its own rules interpreting the language of the statute as applying to both issuance and denial. Site 202.28, provides:

> The committee or subcommittee, as applicable, shall make a finding regarding the criteria stated in RSA 162-H:16, IV, and Site 301.13 through 301.17, and issue an order pursuant to RSA 541-A:35 issuing or denying a certificate.

(Emphasis added). This reflects the SEC's interpretation—in all dockets—that it must consider all criteria, regardless of whether it may eventually deny a certificate.[20] As one SC member stated during the rehearing deliberations: "a reasonable person might read the plain meaning of this rule to require us to consider all four criteria stated in the law." A. 1621-1623; 1701-1702.[21]

That rule is plain: it refers to the required findings in the statute, which are four in number, and to the criteria in specific rules (Site 301.13 through 301.17), which cover all

[20] "The law of this State is well settled that an administrative agency must follow its own rules." Attitash Mt. Service Co. v. Schuck, 135 N.H. 427, 429 (1992). Agencies "must also comply with the governing statute, in both letter and spirit." Appeal of Morin, 140 N.H. 515, 519 (1995). "If the board abuses its discretion—whether by making arbitrary decisions; by failing to comply with the requirements of its governing legislation or with its own rules and regulations; or by failing to follow fair procedures—then we 'will not hesitate to reverse' the agency's decision." *Id.* at 518.

[21] It is noteworthy that between the deliberations preceding the Order, and the rehearing deliberations, a majority of the SC (4 of 7 members) voted to continue deliberations on all of the statutory factors.

of the statutory findings. A reading of the entire statute also supports this conclusion. RSA 162-H:1 makes plain that in selecting sites for energy facilities, the SEC must consider the "significant impacts on and benefits to . . . the welfare of the population, private property, the location and growth of industry, the overall economic growth of the state, the environment of the state, historic sites, aesthetics, air and water quality, the use of natural resources, and public health and safety." These are the very issues addressed in RSA 162-H:16, IV.

The rationale for considering all of the statutory findings is amply demonstrated by the Orders; the findings are interrelated. In this case, the SC based its land use decision on, among other things, "impacts on aesthetics" of the new transmission line, as the RH Order concedes.[22] A. 348. But the SC never deliberated on aesthetics and thus made decisions on aesthetic effects without ever considering whether any of those effects were "unreasonably adverse" as required by RSA 162-H:16, IV(c). Without that determination, some undefined aesthetic impact is meaningless. As one SC member put it during the rehearing deliberations:

> [I]t's hard to consider municipal views without some level of discussion of aesthetics, regardless of the fact that aesthetics would probably come up later as a discussion point . . . [t]here's all the degree of intertwining here. And I think the more we would have gotten into this, the more that intertwining would have—in the criteria would have faded.

[22] In discussing the so-called "tipping point" related to the effects in the existing right-of-way, various members indicated that: (a) "we're talking about aesthetics here, particularly as we talk about intensification" (DT A. 1269): (b) "land use is for the view… I know part of that is aesthetics" (*id.* A. 1286); and, d) "I guess to me it matters a little bit what aspect of this we're talking about. If we're talking about potential visual or aesthetic impacts" (*id.* A. 1288).

A. 1685-1686. That is exactly the point. The SC had "intertwined" issues relevant to different required findings and needed to complete its deliberations and disentangle the issues in a logical way before deciding whether to issue or deny a certificate. Refusing to do so was unreasonable and unlawful.

There are also strong policy reasons for examining all of the factors (as even CFP conceded). CFP Obj. to 2nd RHM A. 538. Administrative permitting proceedings offer an opportunity to submit a new application based on the findings of the agency where material changes address the bases for a denial. CBDA Dev., LLC v. Town of Thornton, 168 N.H. 715, 722 (2016) and Morgenstern v. Town of Rye, 147 N.H. 558, 565 (2002) (*citing* Fisher v. City of Dover, 120 N.H. 187, 190 (1980)). Absent complete consideration of all of the RSA 162-H:16, IV factors, an applicant might resubmit an application in order to address the factor resulting in denial, only to be rejected on the basis of another factor. This undermines the statutory purpose that set out in RSA 162-H:1 that "undue delay be avoided," and creates an inefficient and costly permitting process that discourages development of energy facilities, and results in piecemeal appeals to this Court.

2. The Orders Measure the Applicants' Burden of Proof Against Vague, Arbitrary and Ad Hoc Standards.

The SC shirked its obligation to reach a well-defined understanding of what the key standards and criteria in the statute and rules mean. The SC failed to establish a clear position on fundamental elements of the ODR criterion. Moreover, the members did not even reach a mutually understood and articulated understanding of the regulatory

requirements. Instead, SC members stated different and inconsistent bases for their individual conclusions. The SC found that the Applicants did not meet their burden even though it is patently obvious no applicant could possibly be expected to satisfy a burden of proof against standards and criteria that are vague and moving targets. Even if the meaning of unduly interfere with ODR were clear (and it is not, even to the SC), that criterion may be applied in such a manner that no reasonable applicant could comply with it, and it thus becomes unreasonable and unlawful. That is exactly what happened here.

(a) The SC's Application of its Rules Provide No Definition of Statutory Standards, and No Basis to Assess the Applicants' Burden of Proof.

The SEC rules concerning undue interference with ODR do not include specific criteria relating to that factor, although the statute required the adoption of such criteria.[23] Based on estimates provided by applicants the SEC determines undue interference by considering "the extent to which the siting, construction, and operation of the proposed facility will affect land use, employment and the economy of the region." Site 301.09, 301.15 (emphasis added). Site 301.09 and 301.15 are inherently vague, not only based on this language, but because they relate to economic forecasts of future effects. However, a vague rule may be given definition by reference to extrinsic sources or objective criteria. Webster v. Town of Candia, 146 N.H. 430, 435-36 (2001); *see also* Deering v. Tibbetts, 105 N.H. 481, 485-86 (1964). The SC recognizes this point,

[23] RSA 162-H:10, VII provides, in part, as follows: "As soon as practicable but no later than November 1, 2015, the committee shall adopt rules, pursuant to RSA 541-A, relative to the organization, practices, and procedures of the committee and criteria for the siting of energy facilities, including specific criteria to be applied in determining if the requirements of RSA 162-H:16, IV have been met by the applicant for a certificate of site and facility." (Emphasis added).

acknowledging that rules must "provide [] reasonable notice to the party to form an understanding as to what the law requires." RH Order A. 318. The SC also acknowledges that specificity need not be contained in the statute itself, but may be read in the context of related statutes, prior decisions, or generally accepted usages. *Id*. Yet here, the SC failed to provide any objective standard, expressly declined to follow its past precedent, and there are no related statutes to which an applicant could look to for additional guidance on what the law requires.[24]

Nothing in the Orders brought any clarity to the key provisions of this statute or these rules. On the contrary, the SC rendered its decision in a definitional vacuum where neither it nor the Applicants knew what key terms meant, or how they were being applied. The SC never explains how it defined or applied "undue interference," how it measured the interference with "development," or what it considered to be the "region." The SC's own statements starkly illustrate this point.

In fact, the record demonstrates that the SC was deeply confused about a threshold issue - the meaning of the word "region"—and had no idea how to define that term.[25]

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[24] In each of the cases cited by the SC, the governing board looked to either other regulatory provisions or some other objective standard to define the phrase at issue. *See e.g.* MacPherson v. Weiner, 158 N.H. 6, 9 (2008) (relying on the statute as a whole and the "common legal definition" applied to the phrase at issue); Webster v. Town of Candia, 146 N.H. 430, 435-46 (2001) (holding the regulation was not impermissibly vague based on a warrant article as well as the unambiguous language in the statute, and citing Deering v. Tibbetts, which relied on the objectively "observable character of the Deering town common); Town of Freedom v. Gillespie, 120 N.H. 576, 580 (1980) (relying on the separate planning board regulations which provided the standard); Derry Sand & Gravel, Inc., 121 N.H. 501, 505 (1981) (holding that the regulation was not impermissibly vague based on the statutory statement of purpose, which defined the term at issue); New Hampshire Dept. of Environmental Services v. Marino, 155 N.H. 709, 711-712 (2007) (holding that the statute was clear in that it expressly prohibited a home within fifty feet of Back Lake and permitted DES to impose conditions on the construction of a single-family home); State v. Hynes, 159 N.H. 187, 200-201 (2009) (relying on a dictionary definition of both the words "substantial" and "benefit").

[25] The SC's contention that there is a common meaning of these terms is not only belied by its own confusion but by the dictionary definition of "region." This Court looks to Merriam Webster's Third International Dictionary for guidance. Webster defines "region" as "an administrative area, division or district;" "a major indeterminate division

> I'm still interested, and I brought this up yesterday, this idea of the "region" everything being measured by the region. And I understand that we say "region" in the rules and in the statute. But what constitutes that region? … So I think there's got to be more discussion about, are we looking at this project in chunks, in regions? Is it the sum of its parts? I'm not clear on that yet.

DT A. 1250-1251 (emphasis added).[26] Likewise, Chairman Honigberg stated as follows:

> Mr. Way, I guess a thought in response to your question about what does the "region" mean, or what areas do we have to consider. It's different in different parts of the statute and different parts of our own rules. In some places we are directed to look at what's going on within the affected municipalities, and in some instances it seems like we're being directed to talk about a region that may even be larger than the state of New Hampshire, and there are gradations in between. That's something I think that we might want to have a non-meeting with our own lawyer to talk about that. But it's also something that in some areas we're just going to have to wrestle with and decide what's important, given the particular criterion or set of criteria that we're considering at the time.

Id. A. 1259-1260 (emphasis added).

The SC never resolved its confusion about "region" in the deliberations and it never defined that term in its Orders.[27] This confusion no doubt stemmed from the multiple approaches to defining the "region" that SC members expressed during the deliberations. *See* Addendum B. Despite the fact that the Applicants' specifically raised

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of inanimate creation;" "a particular part of the world or universe…as an indefinite area of land." Merriam-Webster, 2002, at 1912 (emphasis added).

[26] *See also*, DT A. 1138-1140 (Mr. Way: "[T]he Applicant said when you look at the region as a whole, that you're not going to get an unreasonable impact. And you know that's something we have to chat about at some point is region versus the sum of its parts. I mean you can't have a region without the sum of its parts." Mr. Oldenburg: "And where I need sort of help on that is, yes, downtown Plymouth is not a 'region.'")

[27] Remarkably, after the various colloquies in the deliberations clearly showing that multiple SC members did not know how to define "region," the SC glossed over this issue in its Rehearing Order by claiming that its Rules were clear. "The words in the statute are all understood to have a common meaning." A. 326. It did so despite the fact that Project opponents, like the Society for the Protection of New Hampshire Forests, explicitly stated that even they expected the SC to clarify the meaning in the written decision: "[T]o the extent that the collective finding of the SC members on a certain point—like the definition of region—is unclear from reviewing the individual statements of Subcommittee members, that is exactly the sort of clarification one would expect from the written decision." SPNHF Obj. to 1st RHM A. 500. The Applicants agree that one would expect this clarification. None was forthcoming.

this issue in their Motions for Rehearing, the Order and RH Order make no attempt whatsoever to define the term. If the SC could not define this crucial term, how could it possibly conclude that the Applicants did not meet their burden of proof relative to undue interference with ODR? And how could the Applicants ever hope to meet their burden of proof without knowing what definition the SC would give to the term?

The SC's failure to define these terms is significant. As the SEC has noted elsewhere:

> In considering whether the Project will unduly interfere with the orderly development of the region, the Subcommittee must first determine whether such interference impacts the entire region, as opposed to a limited number of residences. Thereafter, the Subcommittee must consider whether the degree of such interference is so excessive that it warrants mitigation or denial of the Certificate.

Decision Granting Certificate of Site and Facility, Groton Wind, Docket No. 2010, A. 1991 (May 6, 2011). Without a definition of the "region," this analysis is impossible.[28]

The SC's refusal to define the terms of the statute and rules undermines the Orders. The failure to define critical terms in RSA 162-H:16, IV and Site 301.15—or to even reach a common understanding of them—resulted in a decision based entirely on each SC member's individual interpretation of the rules. This "subjective" process is unlawful and unreasonable and violates the Applicants' right to due process under the

[28] During the *Groton* deliberations, subcommittee members illustrated this point noting that "because something impacts property values doesn't mean it interferes with the orderly development of the region, and that's what the law says. The law doesn't say 'has a negative impact on property values.' It says "unduly interferes with the orderly development of the region.'" Groton Wind DT A. 2047 (emphasis added). There, a subcommittee member stated that "[b]ecause 'orderly development of the region' has the word 'development' in it, which imposes – it implies that there is some orderly development going on." Drawing a distinction between consideration of individual properties and the region, it went on say "I just don't see how…you can turn around and say 'if someone doesn't like the resulting view, that that interferes with the orderly development of the region', because the development of any region is more than likely going to decrease the view." *Id.* A. 2048.

New Hampshire Constitution, Part 1 Articles 12 and 15. *See* Appeal of Denman, 120 N.H. 569, 571 (1980) (reversing agency decision as unreasonable because application of regulation was based on interpreting a word inconsistent with dictionary definition); s*ee also* In re Jean-Guy's Used Cars & Parts, Inc., 159 N.H. 38, 42 (2009) (reversing agency decision because its interpretation of an undefined term in the statute "was clearly unreasonable or unlawful."); In re Flynn, 145 N.H. 422, 424 (2000) (reversing agency decision as unreasonable because "no reasonable person would anticipate" the application of this regulation in the manner agency applied it.); In re Zurbrugg Mem'l Hosp.'s 1995 Medicaid Rates, 349 N.J. Super. 27, 36 (App. Div. 2002) (agency's failure to provide definition of key term in regulation was arbitrary because compliance became a "matter of chance rather than one that is carefully enunciated and systematic.").

(b) The SC Misapplied Its Own Rules and Imposed an Improper Burden on the Applicants.

RSA 162-H:1 emphasizes the importance of maintaining a "balance among th[e] potential significant impacts and benefits" from siting an energy facility, and incorporates that finding in RSA 162-H:16, IV. Pursuant to Site 301.09, the SEC requires Applicants to provide an "estimate of the effects" on the various subparts of Site 301.09. The SC uses that information to determine the extent to which the Project would, on balance, affect land use, employment and the economy taken as a whole. An applicant's burden of proof here pertains to demonstrating that its proposed project, on the whole, will not unduly interfere with ODR. The SC erred by imposing improper burdens of proof on the Applicants requiring them to prove each "estimate" listed in Site 301.09.

Specifically, the SC erred in three respects. First, there is no explanation of how the SC reached its conclusion concerning the burden of proof on ODR. The Order found the Project would have a positive effect on employment, the economy generally, and taxes, but says that the Applicants failed to prove the impact on land use, property values and tourism. This raises fundamental questions about how the SC got from Point A to Point B: Did the SC add up the "pluses and minuses?" If so, on what basis? Did the SC weigh the factors in Site 301.09 and if it did, how was that done, did some factors count more than others and if so, which ones, and why? The Orders are silent on how the SC weighed any of these elements—or if it did so at all.

In fact, the SC was reluctant to weigh or balance potential significant benefits and impacts, as it was required to do. Doing so, as Commissioner Bailey pointed out, might well have necessitated considering conditions that would have mitigated any perceived impacts or undue interference. As Chairman Honigberg stated in the first deliberations:

> With respect to some of the specific things that the statute and the rules direct us to look at, there are significant holes in the showing by the Applicant with respect to, as I just mentioned, the economic effect of the facility on the affected communities; the effect of the proposed facility on real estate values, on tourism and recreation, and on community services and infrastructure. All of those showings were inadequate to me. Now, <u>those are subcategories of a larger category, and if things were overwhelming in another direction, maybe those could be overcome.</u>

A. 1508-1509 (emphasis added). But the SC failed to even consider whether disagreements with the Applicants' estimates in some areas could be overcome, because it never weighed all the effects against each other or considered mitigating conditions. Instead, it improperly declared that unless it had some unspecified quantum of evidence

with respect to certain estimates, that was enough to deny the Application. Given the obligation to weigh and balance all of the factors, the SC was legally required to explain how its consideration of the separate elements under Site 301.09 rolled up into its overall decision that the burden of proof had not been met.

Second, the Orders strongly suggest that the SC improperly applied a "check the box" approach by requiring the Applicants to prove the estimated effect for each item listed under Site 301.09(b). For example, the SC disagreed with the Applicants' estimate of the effects on tourism and property values, wrongly assigned a burden of proof to those individual elements and then mistakenly concluded that the Applicants could not meet their overall burden of proof. Put differently, because the Applicants did not persuade the SC that their Site 301.09 estimates were, in fact, definitive or certain projections, the Application was denied.

The SEC rules, however, do not require (or even contemplate) such an approach. Rather, they require that all of the elements in Site 301.09 be considered as part of the larger whole in order to determine the effect a project would have on ODR. The Applicants have the burden to show no undue interference with ODR. They do not have a burden concerning each component of 301.09—other than to provide an "estimate of the effects" on each element. Site 301.09 (emphasis added). If the Applicants were required to meet a separate burden of proof as to each of the elements in Site 301.09, the rules should have clearly required that (also doing so might well be contrary to RSA 162-H:16, IV).

Third, the Orders make clear that the SC required some unspecified quantum of proof on each of the elements in Site 301.09. In its discussion of the "problem areas," the SC claims that it must "know[] the extent and nature of such interference," or the "type and extent of impacts." RH Order A. 313, 317. The imposition of a specific quantum of proof goes well beyond the requirement in the rules to estimate future effects which are, by definition, nearly impossible to prove with any degree of precision, as CFP's experts conceded. HT A. 817. The SC's "check the box" analysis required the Applicants to prove estimates to be certain as measured by an undefined scale. This decision was contrary to both the statute and the rules.

(c) The SC Applied Criteria or Standards That Are Contrary to Site 301.15 and That Appear Nowhere in the Statute or Rules.

The Applicants demonstrated in their Motion that the SC applied standards that are entirely inconsistent with the statute and rules and, as a practical matter, are literally impossible to meet. 2nd RHM A. 585-593.

During the initial deliberations, the SC members' statements demonstrated that their understanding of what the Applicants must prove was a virtual Tower of Babel and contrary to RSA 162-H and the SEC rules. The members described their concerns over the Applicants' estimates regarding land use, tourism and property values by using an array of descriptors that were completely untethered to the actual burden the Applicants had. For example, they spoke in terms of whether the Project—or aspects of it—would have "an impact on land use," "no impact on tourism," "an impact on tourism," "an impact on property values," would affect property values "in a negative way," whether

the impact on property values would be "none," or whether there "could not be an impact" on regional plans. *See* Addendum B.

The record shows that the individual SC members mistakenly believed the Applicants had to demonstrate that there would be no impact, or a positive impact, as to each of the elements in Site 301.09 or Site 301.15. That is not what the law requires. Such a burden would not only be impossible to meet, it would be fundamentally inconsistent with the Legislature's unequivocal recognition that the construction of energy facilities would likely have negative effects and that those effects were not, by themselves, sufficient reason to deny a Certificate *(i.e.*, the Legislature enacted a standard that allows for interference with orderly development provided it is not "undue." RSA 162-H:16, IV(b)). The issue is not whether there is an impact with regard to one or more of the components but whether, as a whole, the collective impacts amount to "undue interference."

Even if the SC concluded that the Project would have a negative impact on each of the component parts in Site 301.09, it could not deny an application unless it properly concluded that the Project would unduly interfere with orderly development—and then in a defined region. The SC members' misunderstanding and lack of understanding of this standard, as evidenced by their statements, together with the SC's failure to engage in the crucial analysis regarding orderly development as a whole, was a fatal error.

The Order compounded this problem by applying *ad hoc* criteria and standards that appear nowhere in the rules. 2nd RHM A. 589-593. As the actual findings in the

Order[29] demonstrate, rather than requiring the Applicants to estimate the effects of the Project and to demonstrate whether the combined effects "unduly interfered" to the extent that they could not be mitigated, the SC considered vague and undefined standards. These included considerations such as whether the Project would "overburden existing land uses," whether construction would result in some "potential harms," whether the Project would have "negative impacts" on property values or "hurt tourism." As set out in Addendum C**,** in assessing the Applicants' burden, the Order applied a variety of different standards—none of which is consistent with the RSA 162-H:16, IV or the SEC rules. For example:

- With respect to land use, the SC determined that the transmission line would result in "over-development" of the right-of-way, with SC members addressing whether some undefined "tipping point" would be exceeded. Order A. 285-286; RH Order A. 346-349. The SC also misused and misapplied zoning principles to decide whether the transmission line would be a non-conforming use. *Id.* A. 347-348. But the rule only requires the Applicants to describe how the Project is consistent with "prevailing land uses in the affected communities," and to provide an "identification" of how it is inconsistent with such land uses. Site 301.09 (a).[30]

[29] The findings are set out in the Statement of the Case, above.

[30] The SC uses the terms "over-development" and overburden interchangeably. Either way, the use of the standard is plainly improper. The question of whether a transmission line in a right-of-way overburdens the easement must be determined by the terms of each easement grant. Indeed, in connection with an examination of whether PSNH had the right to lease the easements in which this line was to be constructed the Public Utilities Commission has determined that this is not an appropriate subject for consideration by administrative agencies (SC members Honigberg and Bailey both concurred in that PUC decision. Docket No. DE 15-464, *Public Service Company of New Hampshire d/b/a Eversource Energy Petition to Lease Rights-of-Way to Northern Pass Transmission, LLC,* Order No. 26,001, A. 1949 (April 4, 2017). As the PUC recognized, whether a utility line overburdens land uses in an easement is a matter of property law for the Superior Court. *See also*, Docket No. DE 15-464, Order No. 26,103, *Public Service Company of New Hampshire d/b/a Eversource Energy Petition for Approval of Lease Agreement Between Public Service Company of New Hampshire d/b/a Eversource Energy and Northern Pass Transmission LLC*, A. 1922 (February 12, 2018). These Orders are included in the Appendix at A. 1919 to A. 1953. Moreover, the SC reached the same conclusion in this case, sustaining an objection by counsel for the Applicants that "an overburdening the easement argument...is more appropriate in a court proceeding, not before this Committee," as the SC had no jurisdiction over it. HT A. 810.

- With respect to property values, the Orders found that the Applicants had failed to meet their burden to "demonstrate that the Project will not have an unreasonably adverse impact on real estate values throughout the region." Order A. 202; RH Order A. 354-356. It also questioned whether there would be "no discernible decrease in" such values. Order A. 203; RH Order A. 331. The rules require only an "assessment" of the Project's effect "on real estate values in affected communities" in order to address undue interference. Site 301.09(b)(4).

- With respect to tourism, the Orders find that the Applicants failed to meet their burden because the Project "may have a negative impact on tourism" and that there are valid reasons to believe that the Project would hurt tourism." Order at 277; RH Order A. 358-359. But as with property values, the rule requires only an assessment of the effects on tourism and recreation in order to address undue interference. Site 301.09(b)(5).

The RH Order purports to show that the SC did not apply improper standards. It fails in that effort. For example, the RH Order claims that the SC did not find that the Project was inconsistent with land uses because it overburdened the right-of-way. It contends that use of this term, as well as of the "tipping point" standard, and the non-conforming use doctrine, were only to "illustrate and contextualize the common sense recognition" that an additional line in an existing corridor "can negatively impact land use." A. 346-347. Apparently, the SC would have one believe that these terms were just used for "guidance." Putting aside the fact that the rules say nothing about impacts "within the corridor" and do not contain a "negative impact" standard, the Order sets forth specific findings that contradict the assertions in the RH Order.[31]

[31] The RH Order challenges the Applicants' contention that SC members measured the burden of proof by requiring a showing that there was no negative impact, or some positive impact, claiming that these were just "isolated statements." A. 330-331, 333; *see also* 2nd RHM A. 587-588. But as shown above, these same comments were reflected in findings in the Order. Moreover, the Rehearing Order uses similar descriptions in discussing what the SC found: "The [SC] weighed the evidence and testimony that the Project would have <u>some impact</u> on property values[,]" A. 317 (emphasis added); the Applicants' expert testimony "did not even contemplate that there may be some impact[,]" *id.* (emphasis added); and "The [SC] determined that the Applicant's assessment of the impacts on

> In essence, Mr. Varney suggests that as long as a corridor is used for transmission lines, there can never be a "tipping point" where the effect of transmission infrastructure on the land use becomes too intense. We disagree.
>
> While not legally required to apply the three prong analysis [of non-conforming use], we find it to be informative in the context of this case. There are areas along the route where the introduction of the Project with its increased tower heights and reconfiguration of existing facilities would create a use that is different in character, nature and kind from the existing use.

Order A. 285-286, 287 (emphasis added). The SC's effort to disavow its own findings further demonstrates the arbitrariness of its decision-making.

The SC's confusion regarding the standards it was applying and the extent to which members understood that those standards were not in the SEC rules is amply demonstrated by Mr. Way's statement during the initial deliberations:

> And where we're focusing upon I think is, as someone said, that "tipping point." There is that tipping point where it isn't something that one would come to expect or ever expect in that right-of-way. Not saying this is it. I'm just saying that's what we're talking about. And then the question is, and I've got to look at this even more, is how do we take that tipping point and meld it into our rules. There's an on/off thing. It's either with prevailing land use or it's not. I'm also thinking we're talking about aesthetics here, particularly as we talk about intensification, the aesthetics from the neighborhood and the rural character that's encouraged by master plans. So I'm trying to think if we take some of these pieces together, that might help us figure out what is that tipping point. I'm not exactly sure myself where it is.

HT A. 1268-1269 (emphasis added). In short, the "tipping point" standard is not part of the SEC rules, relates to aesthetics (which the SC never considered) and cannot be defined by the SC, which nevertheless used it.

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the economy and employment failed to account for the negative impacts on local businesses." *Id.* A. 329 (emphasis added).

The SC applied standards created specifically for this Project and that no reasonable applicant could possibly anticipate. Equally important, the Order finds that the Applicants failed to meet their burden of proof without once assessing the effect of the Project on development, whether any effect would interfere with orderly development, and whether any interference would be undue, or defining the "region" to which the SC was applying these new tests. The Chairman described the Applicants' arguments concerning the imposition of *ad hoc* standards as simply an "argument for lawyers" and "for the Supreme Court." RDT A. 1651-1652. The Applicants agree that this is an issue for this Court—and one that amply demonstrates the reasons why this Court should accept this appeal.

3. The SC's Failure to Consider Mitigating Conditions Nullifies its Conclusions on the Applicants' Failure to Meet Their Burden of Proof

The SC's refusal to deliberate is compounded by its failure to evaluate mitigating conditions that might have alleviated "undue interference."[32] Commissioner Bailey had it right when she noted that continued deliberations might have caused the SC to consider mitigating conditions proposed by the Applicants or imposed by the SC. The SC's refusal to consider such conditions misconstrues the Applicants' arguments and is contrary to common sense and past practice.[33]

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[32] At several points during those preliminary deliberations, members of the SC discussed the possible consideration or imposition of conditions relating to the criteria underlying the undue interference with the ODR finding, but it never actually deliberated over such conditions, and thus did not address whether they might mitigate any concerns members expressed over the impact of the Project on potential "undue interference." *See e.g.* DT A. 1091, 1152-1154; 1370; 1397-1398.

[33] In the past thirty years, the SEC has issued at least thirteen certificates in which it imposed over 300 conditions, often to ensure that there was not "undue interference" or an "unreasonable adverse effect." Previous certificates have addressed the issue of "undue interference" by stating as follows: "WHEREAS, the Subcommittee finds that, subject to the conditions herein, the Project will not unduly interfere with the orderly development of the region,

The SC casts the Applicants' arguments concerning the obligation to consider all mitigating circumstances as "requiring the [SC] to draft and consider conditions that could cure the Applicant's failure to carry its burden of proof." RH Order A. 316. The Applicants made no such argument. Rather, they argued that mitigating conditions are an integral part of the burden of proof, and that the SC has broad discretion to impose conditions, whether proposed by the Applicants or fashioned by the SC itself. 2nd RHM A. 568.

RSA 162-H:1 specifically recognizes that energy projects "may have significant impacts," which is why it finds that it is in the "public interest to balance those potential significant impacts and benefits." Mitigating conditions are essential to that balancing. In fact, the words of RSA 162-H:16 assume, almost as an imperative, that any certificate will contain conditions. Moreover, the SEC rules specifically require consideration of, among other conditions: "[a]ny other conditions necessary to serve the objectives of RSA 162-H or to support findings made pursuant to RSA 162-H:16." Site 301.17(i).[34] In fact, the "undue interference" and "unreasonable adverse effect" standards presume interference and adverse effects, with the result that mitigation is one way to insure that the interference and effects do not become "undue" or "unreasonable."

with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies." *See e.g. Order and Certificate of Site and Facility with Conditions, MVRP*, Docket No. 2015-05, A. 2662 (October 4, 2016). In this docket, the Department of Environmental Services set out nearly 30 pages of proposed conditions prior to the time that the hearings began. Letter from Rene Pelletier A. 2630-2660.

[34] *See also*, Site 301.14. Each subsection of that rule, which addresses the "Criteria Relative to Findings of Unreasonable Adverse Effects," provides that the SEC shall consider "the effectiveness of the measures proposed by the applicant to avoid, minimize, or mitigate unreasonable adverse effects on aesthetics, and the extent to which such measures represent best practical measures." There is simply no reason to include such conditions to meet one portion of the statutory findings but exclude consideration of conditions as to the undue interference finding.

The RH Order contends that the Applicants argue for an "absurd result," in which the SC must consider conditions even if it finds that an applicant did not satisfy the requirements of RSA 162-H:16, IV. A. 316. But this presumes, mistakenly, that the consideration of conditions is divorced from proof in the first place. In fact, the Orders create a counter-intuitive paradigm where mitigating conditions are considered only if an applicant demonstrates that a project would not unduly interfere with ODR, independent of mitigating conditions. *Id*. If this were true, no energy project could ever be built.[35] For example, consider a wind project where sound testing demonstrates that there were exceedances in certain locations but where technological controls could shut down the turbine when they occurred, and the certificate was conditioned on that mitigation technique. Under the SC's view of mitigation, such a certificate must be denied because without mitigation, the project would have an unreasonable adverse effect on public health. The SC's view is also contrary to common sense. If an applicant has already established—without any mitigation—that a project does not unduly interfere with ODR, why would any mitigation be necessary?

Likewise, the SC's conclusion is completely inconsistent with the statutory framework and the practice of the SEC. RSA chapter 162-H contemplates that two types of conditions will be considered. First, RSA 162-H:7 and 7-a provide a procedure whereby agencies with specific expertise and permitting responsibility will evaluate and, if appropriate, draft, "permit conditions...necessary to make a final decision on the parts

[35] Furthermore, if this were the case, Site 301.17 (i) would read "<u>After determining that</u> a certificate shall be issued." The SC's reading writes the word "whether" out of the regulation.

of the application that relate to its permitting or other regulatory authority." RSA 162-H:7, VI-b. Those conditions are then provided to the SEC, which "shall incorporate in any such certificate such terms and conditions as may be specified to the [SEC]" by the agencies with permitting authority. RSA 162-H:7-a, I. Second, the SEC itself may propose conditions unrelated to the specific requirements of the state permitting agencies. RSA 162-H:16, VI provides that a certificate "may contain such reasonable terms and conditions…as the [SEC] deems necessary." Both types of conditions are (and have been) core elements of this process; it is conditions, as illustrated above, that render potentially unacceptable impacts to be acceptable. As such, the SC's refusal to even consider such conditions is wholly inconsistent with this statutory structure and past practice.[36]

The Order found—at least for property values and tourism—that because the SC had no accurate way to measure the effects in these areas, it was "impossible for [it] to

[36] In other permitting contexts—such as under the National Environmental Policy Act, wetlands regulations or zoning ordinances—it is well-recognized that the potential adverse impact of an applicant's proposed action is assessed with due regard to the applicant's proposed mitigating measures. See, e.g., Envtl. Prot. Info. Ctr. v. U.S. Forest Serv., 451 F.3d 1005, 1015 (9th Cir. 2006) (holding that it was proper for agency to incorporate mitigating measures through its plan of action, analyzing the effects with the measures in place, rather than first determining the potential impacts of the action and then developing a plan to mitigate those adverse effects); Okanogan Highlands All. v. Williams, 236 F.3d 468, 476-77 (9th Cir. 2000) (holding that agency's Environmental Impact Statement was appropriate where the specific effect on water quality was uncertain, so the agency considered potential effects and a procedure to determine specific mitigation if any was ultimately required); Holy Cross Wilderness Fund v. Madigan, 960 F.2d 1515, 1522-26 (10th Cir. 1992) (finding that because permit was conditioned on no wetland losses, it was not error for the agency to refrain from conducting its own evaluation on the adverse impact on wetlands; permit assumed adverse impact on wetlands, and essentially guaranteed mitigation); *see also* Council on Environmental Quality, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," 46 Fed. Reg. 18026, 18037 (Mar. 23, 1981) ("where the proposal itself so integrates mitigation from the beginning that it is impossible to define the proposal without including the mitigation, the agency may then rely on the mitigation measures in determining that the overall effects would not be significant"); Rathkopf's THE LAW OF ZONING AND PLANNING § 61:49 (4th ed.) (noting that permits typically "may not be denied based on negative land use impacts that could be substantially eliminated or mitigated by conditions attached to the permit").

even begin to consider" mitigating measures. A. 292-293. The RH Order doubles down on this claim, stating that "[w]ithout knowing the extent and nature of such interference" (*i.e.* undue interference with ODR) it "could not articulate conditions." A. 310. This assumes that in forecasting the potential effects of the Project on property values and tourism, the Applicants could ever estimate precisely (a contradiction in terms) what the effects would be. Yet even CFP's expert on property values and tourism conceded that "it is difficult to estimate" property valuation losses with a high degree of precision, and that proof of tourism impacts resulting from the construction of a transmission line are "virtually impossible to measure." Order A. 187 (emphasis added); Kavet Testimony A. 817 (emphasis added).

The SC's search for a particular quantum of proof was simply an exercise that avoided a rigorous analysis of the impacts of the Project; in fact, there was ample evidence of possible mitigation in the record to allow the SC to address the effects of the Project on property values and tourism. Moreover, the insistence on a precise quantum of proof is at odds with what the SEC has, itself, acknowledged in its own rules, namely that such proof is not always available or at all necessary to a decision, and can be addressed by imposing a condition:

> In determining whether construction and operation of a proposed energy facility will have an unreasonable adverse effect on the natural environment, including wildlife species, rare plants, rare natural communities, and other exemplary natural communities, the committee shall consider: . . . (7) Whether conditions should be included in the certificate for post-construction monitoring and reporting and for adaptive management to address potential adverse effects that cannot reliably be predicted at the time of application.

Site 301.14(e) (emphasis added).

Here, the SC ignored mitigating conditions that were relevant to the effects of the Project. With respect to property values, the Applicants offered a "property value guaranty" ("PVG") "designed to ensure that that owners of those properties identified as most likely to see property value impacts do not incur an economic loss in the event of a sale within 5 years after construction begins." Quinlan Testimony A. 2626.[37] The SC expressed concerns about the mechanics of the PVG and that eligibility was limited to single family homes encumbered by or within 100 feet of the right-of- way. Order A. 206. Its primary concern appeared to be that increased visibility of the new line would impact property values. *Id.*

The SC never deliberated on whether it could, or should, require an expansion of the PVG. Even CFP's expert Mr. Kavet, believed this issue could be addressed, testifying that the Fund "would be more than adequate to compensate affected parties" regarding property value effects and that the Fund provided "a substantial amount of money that could be directed in different ways." HT A. 820. Chairman Honigberg also observed that although the PVG was "criticized as inadequate by a number of people…I think it's fair to say that that proposal is a proposal and the Company would be open to revisions or expansions if the Committee felt it was important to do so." DT A. 1330. In

[37] Early in the hearings, Chairman Honigberg asked Mr. Quinlan about the PVG and other commitments and conditions: "Q. To the extent that, as it currently exists, like the work-in-progress Guarantee Program, that may need some refinement before it can be rolled out and implemented. Would you agree? A. Yes, if you're referring to the property value...right now it's a concept. I think we have the framework of a program, to the earlier question, that probably could use some further development before it's ready for execution, if you will." The Chairman added: Q. And since we're not going to be done here tomorrow, there's time even through these proceedings and then through deliberations to work through how that might get improved or how other commitments might be refined and make their way into conditions. Would you agree with that?" Mr. Quinlan answered "yes." HT A. 814.

sum, if the SC wished to expand the PVG to cover more homeowners, it could have done so. Had it done so, it would have eliminated the property value issue as a concern.[38]

Likewise, there was ample opportunity for the SC to address the effects on tourism by directing money from the Fund. As shown in Part 4 c below, Mr. Kavet testified that there would be virtually no impact at all on tourism (a "teeny tiny percentage") and that tourism was likely to grow regardless of whether the Project was built. The SC altogether ignored this testimony as well as the impact of the Fund and its express focus on tourism and economic development. Had the SC considered the Fund, it could have considered conditions on its use that would have mitigated any potential impact on tourism.

The SC's failure to even consider conditions is contrary to the SEC's own rules and past precedent, unreasonable and unlawful.

4. The Orders Failed to Follow SEC Precedent, Imposed New Requirements or Methodologies on an Ad Hoc Basis, and Failed to Consider All Relevant Evidence.

The Orders ignored prior precedent, imposed requirements on expert testimony that no reasonable applicant could have anticipated and that amounted to rulemaking, and ignored relevant evidence. The result is a purely arbitrary decision.

(a) The SC's Findings on Land Use Departed From Years of SEC Precedent Without Any Explanation For that Departure.

[38] In their Motion for Rehearing filed on February 28, 2018, the Applicants submitted a sample proposed expansion of the PVG for the SC's consideration based on the existing record. A. 639-641. That proposed revision went well beyond the category of properties identified and would cover all homes located within 200 feet of the edge of the Project right-of-way. The SC gave it no consideration.

The SEC's rules require an applicant to furnish an "estimate of the effects of construction and operation" of the proposed facility on "[l]and use in the region, including … (1) a description of the prevailing land uses in the affected communities; and (2) a description of how the proposed facility is consistent with such land uses and identification of how the proposed facility is inconsistent with such land uses." Site 301.09(a). The SC concedes that "[n]either the statute nor the [SEC] rules precisely define 'land use'" but that the specificity required by due process can be supplied by prior decisions. RH Order A. 348 and 318.[39] The SC ignored the very precedent that would have provided that specificity.

The SEC rules address both the consistency and inconsistency of a project with the prevailing *use* of land in the affected communities. For example, construction of a 100-acre solar facility on a farm in a rural community, by converting land used for agriculture to energy production, would appear to be inconsistent with the prevailing land uses in the affected community. The issue is whether prevailing land uses are affected by the facility (ultimately in relation to the region). That is, if the solar facility prevents further agricultural use and fundamentally alters the way in which development would occur, the facility may (when considered with all the other statutory factors) unduly interfere with ODR.[40] However, where an existing right-of-way through a community containing

[39] In fact, prior SEC decisions have provided an administrative gloss on the SEC's land use regulation by interpreting the issue "in a consistent manner and apply[ing] it to similarly situated applicants over a period of years without legislative interference." Appeal of N. Miles Cook, III, 186 A.3d 228, 234 (2018); Appeal of Stewart, 164 N.H. 772, 776 (2013).

[40] As noted, 83 percent of the Project is located in existing electric transmission line and transportation corridors, that prevailing land uses along the corridor include forest, agriculture, residential, commercial, industrial, transportation, utilities, natural resources, conservation and recreation, and that the Project will not prevent these uses from continuing. Varney Testimony A. 2502. Furthermore, the extent to which the Project will affect land use

transmission lines is part of the prevailing land uses, the addition of another line is consistent with the prevailing land uses in that community. This is precisely what the SEC has consistently concluded in defining consistency with land use for transmission lines.

For 36 years prior to this case, the SEC and its predecessors regularly ruled that in assessing whether a proposed transmission line will unduly interfere with orderly development, "the single most important fact bearing on this finding" is that that the proposed transmission line occupies or follows an existing, occupied utility corridor.[41] Just two years ago, in the Merrimack Valley Reliability Project ("MVRP"), the SEC considered the construction of a new transmission line in an existing right-of-way. The MVRP subcommittee applied this "single most important factor" stating that "[c]onstruction of the Project within an already existing and used right-of-way is consistent with the [ODR]" and that "the Applicant seeks to construct the Project within the existing right-of-way that, for years, has been used to transmit electricity and is encumbered by associated structures and equipment." *Decision and Order Granting*

in any community is insignificant. In every community except two, the right-of-way represents less than one percent of the land area. With respect to the two exceptions, the highest is 2.37 percent in Franklin, a city that supported the Project. Varney Report A. 2461.

[41] Other decisions reaching the same conclusion include: Docket No. DSF 81-349, *Re New England Electric Transmission Corporation*, Order No. 16,060, A. 1795 (December 17, 1982) (concluding no undue interference where the line occupied an existing right-of-way and that the "proposed facility is compatible with land use patterns in the area and will not interrupt or conflict with land use plans or developments or interfere with existing commerce."); Docket DSF 85-155, *Re New England Hydro-Transmission Corporation (Hydro Quebec Phase II)*, Order No. 18,499, A. 1832 (December 8, 1986) (finding that "the single most important fact bearing on this finding is that the proposed transmission line occupies or follows existing utility transmission rights-of-way or utility-owned property for its entire length of 121 miles."); DSF 91-130, *Re Public Service Company of New Hampshire*, Order No. 20,739, A. 1875 (February 2, 1993) ("Use of the existing right-of-way for the proposed line will be consistent with the established land use patterns in the area."); DSF 93-128, *Re New Hampshire Electric Cooperative, Inc*., Order No. 21,268, A. 1912 (June 14, 1994) (existing right-of-way "makes the proposed facility compatible with the land use patterns in the area and will not interfere or conflict with land use plans or developments or interfere with commerce."). These orders are included in the Appendix at A. 1782 to A. 1953.

Certificate of Site and Facility, MVRP, SEC Docket No. 2015-05, A. 2115 (October 4, 2016).[42]

The Applicants retained Robert Varney[43] to assess the effects of the Project on land use. Relying on this past SEC precedent, and his own analysis of SEC Rule 301.09(a), Mr. Varney's report described the prevailing land uses along the right-of-way. Varney Report A. 2467. He pointed out that these uses have coexisted with existing electric utility and transportation corridors as part of the fabric of local and regional development and he concluded that the Project, which was to be constructed within the existing transmission line and transportation corridors— will not prevent these uses from continuing in the future. *Id*. A. 2473-2474.

The SEC serves as a quasi-judicial permitting body. The First Circuit has recognized that "when an agency fills a quasi-judicial role, it builds a body of precedent which it cannot thereafter lightly disregard." Com. of Mass., Dep't of Educ. v. U.S. Dep't of Educ., 837 F.2d 536, 544 (1st Cir. 1988). That Court also pointed out that "[l]ike courts, agencies 'have an obligation to render consistent opinions and to either follow, distinguish or overrule' their earlier pronouncements." *Id. citing* Chisholm v.

[42] The facts and evidence the subcommittee relied on in MVRP are very similar to the facts and evidence submitted here. First, like Northern Pass, in MVRP "land used along the right-of-way includes forest, agriculture, residential, commercial/industrial, transportation, institutional/government, recreation areas, conservation, historical, and natural features." *Decision and Order Granting Certificate of Site and Facility, MVRP*, SEC Docket No. 2015-05, A. 2107 (October 4, 2016). The heights of the structures in MVRP were approximately 40 to 50 feet taller than the nearest existing structures and relocated structures ranged from 3 to 30 feet taller. *See id.* A. 2064-2065. Yet the MVRP subcommittee did not find that the addition of a new 345-kV transmission line, with structures that were 40 to 50 feet higher than existing structures, would negatively impact land use or interfere with development patterns along the corridor, nor did it discuss the notions of overdevelopment or overburdening. When the Legislature amended RSA chapter 162-H in 2015, it made no change to this longstanding precedent.

[43] Mr. Varney is a former director of the NH Office of State Planning and two NH regional planning commissions, a former SEC member, the former longtime Commissioner of the NH DES and the former US EPA Region 1 Administrator. Varney Testimony A. 2495-2496.

Defense Logistics Agency, 656 F.2d 42, 47 (3d Cir.1981). An unexplained inconsistency in agency policy is reason for holding an agency's determination to be arbitrary or capricious and is not entitled to deference. Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005).

In this docket, this SC abandoned its well-established precedent with no explanation of why it was not applicable to this Project other than to say that it is not "a principle to be applied in every case." Order A. 285.[44] The SC criticized Varney for relying on the "mistaken premise" that a project constructed in an existing transmission corridor will be consistent with prevailing land uses and thereby failing to recognize that "it is possible for a transmission project constructed within an existing right-of-way to impact existing land uses." RH Order A. 334-335, 347 (emphasis added). It claims to have "received substantial testimony and evidence indicating that the Project, due to its size and scope, would intensify and overburden the right-of-way." *Id.* A. 334-335 (emphasis added).[45]

Rather than following well-established SEC precedent, the SC simply speculates about ways in which: "over-development" (apparently the same as "overburdening") and

[44] During rehearing deliberations, one SC member stated that "if you have something that's completely different than anything that's ever been proposed in the past, you can't expect everything to go the same way, stating that this Project is different because "first, it's not entirely in the existing right-of-way." A. 1668. Nothing in the Order justifies this departure. With the exception of 32 of the 192-mile line, the Project is in the existing right-of-way or underground in existing roadways. As for the 32 miles that would be in a new right-of-way, the Order is fundamentally inconsistent. Twenty-four of those miles are located in the Bayroot/Wagner Forest and are privately owned. Because the owner of that land supported the Project, and expressly preferred overhead construction, the SC deferred to that preference. A. 289. Yet the same rationale should have applied to the remaining eight miles of nearby overhead construction on land acquired by the Project. Yet the SC applied a wholly different analysis to that segment without any explanation whatsoever for the inconsistency. DT A. 1288-1292; *see also* Order A. 289-290.

[45] The SC does not identify any of the "substantial testimony and evidence" it relied on. This is so for good reason: there was none. And as discussed above, "overburdening the right-of-way" is not the standard. Nor does the SC identify the "region" in which this "overburdening" of the right-of-way occurred.

the elusive "tipping point" "can impact land uses in the corridor and unduly interfere with [ODR];" "ugly transmission corridors or infrastructure can impact real estate development;" and "[a] highly developed corridor may discourage use of the corridor for recreational purposes." Order A. 285-286 (emphasis added). What the Order does not say is where this line—which was to be constructed in accordance with the SEC's past precedent —actually does impact land uses, where "unsightly transmission corridors" actually do impact real estate development, or where the line actually does discourage use of the corridor.[46] Nor does the Order explain why if this overdevelopment occurred, it would be inconsistent with prevailing land uses or would amount to undue interference with ODR (let alone in what "region" that interference might occur).

In fact, the SC's reason for abandoning its well-established SEC precedent appears primarily to be one of aesthetics, focusing on the "increased tower heights" and "reconfiguration of existing facilities," which it presumes, without any factual basis, would have a "substantially different effect on the neighborhood." Order A. 287-288. But aesthetic considerations are the subject of a separate criterion that applies a different standard, *i.e.*, "unreasonable adverse effect." RSA 162-H: 16, IV (c).[47] What the SC

[46] The SC noted five locations where, due to increased tower heights, the Project "would have a substantially different effect on the neighborhood than the existing transmission facilities." RH Order A. 349; Order A. 287-288. Apart from the fact that the "substantially different effect" says nothing about "consistency with land uses," that the SC's findings are based on aesthetics rather than the use of land, and that the SC does not explain what this effect is, the Applicants' demonstrated that the SC's findings that the towers were higher in these locations were inaccurate. 2nd RHM A. 607-608.

[47] RSA 162-H:162-H:16 includes aesthetics under RSA 162-H:16, IV (c). If the Legislature had intended the SEC to consider aesthetics under subpart IV(b) and as part of orderly development, it would have said so. Moreover, the SEC rule governing aesthetics ties aesthetic considerations to scenic resources not, as the SC does here, to the view of towers from individual homes (which in any event is unrelated to the land *use*). Site 301.05 (b)(1) and 301.14 (a). And aesthetics are measured by a different standard, *i.e.*, "unreasonable adverse effect." RSA 162-H:16, IV(c).

determined here was the possible visual impact of the transmission line on individual properties rather than the region, for the wrong purpose, and even then without applying the correct standard, *i.e.*, whether there was not just an impact but an unreasonable adverse impact. Furthermore, it concluded that reconfiguration equates to overdevelopment when, to the contrary, reconfiguration leads to a more efficient use of the existing transmission corridor and is, therefore, entirely consistent with orderly development. There was no reasoned basis for departing from past precedent. Quite the contrary, the rudderless manner in which the SC departed from precedent was entirely without reason, conflicting, as it did, with the applicable law, SEC rules, facts, and common sense.[48]

Absent a clearly defined standard and with no ability to rely on precedent, no applicant can know how the SEC will apply its land use criteria until after deliberations begin at the end of a multi-year process, and only after an applicant has committed vast resources. Based on the Orders, the answer is "it wouldn't" because "every project is different." RDT 1669. That is the very definition of *ad hoc* decision-making.

(b) The SC Rejected Expert Testimony and Methods as Unreliable Despite Acceptance of and Reliance on the Same Testimony and Methods in Other SEC Dockets.

In the areas of land use and property values, the Order is largely an attack on the Applicants' experts and the methods they used. A. 171-185, 207-226, 239-253. The Orders detail a series of criteria or factors the SC faults the experts for not applying or

[48] "[T]he dominant law clearly is that an agency must either follow its own precedents or explain why it departs from them." Shaw's Supermarkets, Inc. v. N.L.R.B., 884 F.2d. 34, 36 (1st Cir. 1989)(citation omitted).

considering, none of which appear in SEC rules or prior SEC decisions. Thus, until the SC created these requirements solely for this case, applicants had no notice of the requirements they would have to meet. In contrast, the SEC has adopted detailed criteria pertaining to some of the statutory factors in RSA 162-H:16, IV, but chose not to adopt such detailed criteria for ODR.[49] By imposing new, detailed requirements for ODR in this docket, the SC engaged in *ad hoc* decision-making and rulemaking prohibited under RSA 162-H:4-a, I and RSA 541-A:22.

As noted above, the SC criticized Mr. Varney's analysis of land use, pointing out areas that he did not analyze or study and that were not evaluated in his report. Order A. 241-246. With respect to property values, the Order found the opinion of the Applicants' expert, Dr. James Chalmers, not to be credible,[50] devoting more than twelve pages to a critique of the methods he used, and identified a series of very specific types of real estate it claimed he should have covered (and most of which he did cover). A. 171-183, 205-206. The RH Order concluded that "the Applicant was <u>required</u> to provide an assessment of the impact of the Project on these types of real estate."[51] A. 355 (emphasis added).[52]

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[49] The rules set out in detail what must be shown on aesthetics (Site 301.05), historic sites (Site 301.06), the environment (Site 301.07), public health and safety (Site 301.08) and regarding unreasonable adverse effects in those areas. Site 301.14.

[50] In the rehearing deliberations, Chairman Honigberg noted that references to "credibility" were not intended to convey that the SC did not believe the witness, but rather that there was a "problem with their underlying work," a "logic flaw," or an "inadequate basis." RDT A. 1675-1677.

[51] One SC member admitted that the rules do not require an analysis of the impact on any specific properties: "I also think we've been faulted for…or, another argument of the Applicant is that they were not required—the rules don't require them to ascertain the impact on commercial properties, condominiums, second homes, vacant land, underground portions, etc. <u>And perhaps our rules don't spell out all the different types of real estate</u>, but our rules do require them to inform us as to the effects on real estate values in general. And those subsets, <u>in my mind,</u> are real estate values." RDT A. 1674 **(**emphasis added). Put simply, the Orders stand for the proposition that the applicable rules are not those that have been applied in the past, but those that a particular subcommittee adopts on an *ad hoc* basis.

[52] The Order contains an even more detailed attack on the methods applied by the Applicants' tourism expert Mitch Nichols, devoting more than twenty pages to a critique of Mr. Nichols' methodology, in many instances at a

No reasonable applicant could have anticipated the SC's expectation that these witnesses should have used analytical methods found nowhere in the rules or prior precedent. Just two years ago (well after these proceedings had begun) the SEC accepted and relied on reports, identical in substance and nature, from Mr. Varney and Dr. Chalmers citing the same studies and using the same methods to assess the effects of high-voltage electric transmission line in an existing right-of-way on land use and property values. See *Decision and Order Granting Certificate of Site and Facility, MVRP*, SEC Docket No. 2015-05, A. 2109-2113 (October 4, 2016)(accepting the Chalmers analysis that MVRP would have only a minimal effect on specific property values along the project route, and finding that "[c]onstruction of the Project within an already existing and used right-of-way is consistent with the orderly development of the region."). *See* reports of Varney and Chalmers in both MVRP and NPT attached. A. 2258-2522.[53]

Why was it that the methods applied to determine undue interference with ODR on property values and land use were acceptable in MVRP but unacceptable here? The Orders are devoid of any explanation. Where do the SEC rules require an applicant to include all of the items the SC criticizes these experts for not including (and, in some cases, asserts were actually required)? The Orders are silent. In sum, the SC simply

granular level. A. 207-235; A. 358. For example, the SC's criticism goes so far as to criticize the format of a specific question asked in an online survey.

[53] With respect to tourism, the SC criticized Mr. Nichols' methodology despite the fact that the opponents "did not provide any analysis or scientific evidence to substantiate their opinions" on tourism, Order A. 234, and that the expert for CFP testified that tourism impacts resulting from a transmission line being built are "virtually impossible to measure," and "difficult to quantify." HT A. 817; Kavet Testimony A. 2531.

manufactured rules and standards solely for this case. This *ad hoc* decision-making and rulemaking is prohibited. Metromedia, Inc. v. Dir., Div. of Taxation, 97 N.J. 313, 331–32 (1984);[54] *see also* Tennessee Cmty. Organizations v. Tennessee Dep't of Intellectual & Developmental Disabilities, No. 00991COAR3CV, 2018 WL 2175818, at *19 (Tenn. Ct. App. May 11, 2018) (applying the test from Metromedia); Sams v. Dep't of Envtl. Prot., 308 Conn. 359, 382–83 (2013) ("The test for determining whether agency conduct or an agency ruling amounts to a regulation, and thus must comply with the UAPA, is whether such conduct or ruling has a "substantial impact on the rights and obligations of parties who may appear before the agency in the future.").

(c) The SC Ignored Evidence It Was Required to Consider in Assessing Whether the Project Unduly Interfered with ODR

In addition to failing to follow precedent and creating new rules on the fly, the SC ignored evidence demonstrating that the effects of the Project would not unduly interfere with orderly development (even if it could not define the region). The SC found that because the Applicant's proof on tourism was deficient, it had no basis to determine the extent of the Project's effect on tourism. At the same time, it ignored a key piece of

[54] In Metromedia, the New Jersey Supreme Court applied the following test to define improper rulemaking: "[A]n agency determination must be considered an administrative rule…if it appears that the agency determination, in many or most of the following circumstances, (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy. These relevant factors can, either singly or in combination, determine in a given case whether the essential agency action must be rendered through rule-making or adjudication." 97 N.J. 313, 331–32.

testimony wherein CFP's expert conceded the critical point that the Project would have no material impact on tourism.

Having dismissed the Applicants' evidence, the SC credited evidence from CFP's expert, Kavet, Rockler & Associates, LLC ("KRA") (which the Applicants disputed) suggesting that this evidence demonstrated a negative effect on tourism. KRA estimated a potential impact on tourism of between 3% and 15%, which was calculated to result in "direct spending losses of approximately $10 million per year . . . and total economic impacts, including secondary effects, of average annual losses of more than $13 million in gross State product (GSP) and the loss of approximately 190 jobs…from 2020 to 2030." Order A. 228. But the SC conveniently left out the punchline. KRA's opinion was that the potential impact to tourism in the State is a "teeny tiny percentage," with a potential impact of "15 hundredths of one percent … change in tourism activity in the affected areas." 2nd RHM A. 571-574. "[S]o you won't see it, when you see the state of New Hampshire tourism hit a record high…It will keep going up. It's not going to be something…where you're getting some decline in tourism. It's a small part of it. It's a small change." *Id.* A. 573-574; HT A. 2670.

The SC completely ignored that evidence, claiming that the opponents had no burden of proof with respect to tourism. Order A. 234-235. As one member stated regarding whether the SC should have addressed other evidence in the record: "I don't feel as though we're required to do that." RDT A. 1636. In fact, they were clearly required to do that. RSA 162-H:16, IV. This blindered approach to evaluating evidence violates the statutory mandates to consider "all relevant information," and to weigh the

benefits and impacts when deciding whether the Project would cause "undue interference." Whether the opponents had a burden of proof is irrelevant.[55] The SC was required to consider all of that evidence.

(d) The SC Mischaracterized the Applicants' Position on Capacity Market Benefits to Justify Its Refusal to Consider the Extent of Project Benefits on the Economy of the Region.

The SC also inappropriately failed to consider significant benefits of the Project that may well have "overwhelmed" any perceived or actual impacts on ODR. PHM A. 2181-2208. As Chairman Honigberg suggested, the entire outcome of this matter might have been different if the SC had considered those significant benefits. DT A. 1508-1509

The benefits in question involved savings from the Forward Capacity Market ("FCM").[56] The Applicants' expert, Julia Frayer, provided substantial evidence that the Project would produce FCM benefits. Order A. 136-142. Notably, the SC deemed Ms. Frayer's testimony to be credible. DT 1309-1310, 1491, 1500-1501. Furthermore, CFP's expert agreed that in most scenarios those benefits would accrue (although it was not willing to opine one way or the other on whether any one scenario was more likely to occur than another) and that they could be significant—in the hundreds of millions of dollars. Order A. 151-153.

[55] Site 202.19(a) entitled "Burden and Standard of Proof states: "The party asserting a proposition shall bear the burden of proving the proposition by a preponderance of the evidence."

[56] The FCM is a long-term wholesale market designed to promote adequate and economic investment in supply and demand resources. Capacity resources may include supply from new power plants, the decreased use of electricity through demand resources, and import capacity. For example, the FCM compensates generators for committing their generating capacity on an annual basis. While somewhat complex, the ultimate result is that electricity consumers are responsible for paying the price of those capacity commitments.

The SC ignored these benefits, misquoting a statement in the Applicants' Post-Hearing Memorandum to say that determining whether these benefits would be available was "'intellectually interesting,' but not 'outcome determinative.'" *Id.* A. 168. It later mischaracterized the Applicants' position as an "admission that qualifying and clearing the Capacity Market is merely an intellectual exercise." *Id.* A. 169. The Applicants made no such "admission."[57] Instead of taking the statement, as the Applicants' intended, as meaning the FCM benefits would be significant by almost any measure,[58] the SC used it as a convenient foil, not only to avoid addressing the benefits, but to dismiss them entirely without having to provide any analysis or explanation. The SC's contortion of the Applicants' position is devoid of any logic or reason because it suggests the Applicants had dismissed the value of their own witness' research and analytical work, and her testimony. The SC would have the world believe that, after the Applicants' had devoted so much time, resources and effort in having Ms. Frayer calculate and then recalculate the FCM benefits, that the Applicants had simply said, "oh well, that was a meaningless effort that can be entirely ignored."

[57] What the Applicants said is as follows: "It is beyond question that Northern Pass will generate significant benefits for the State of New Hampshire and New England. The sub-issues in dispute relate only to the magnitude of the economic benefits to New Hampshire and the region. Testimony and evidence submitted by experts for CFP tend to agree with the Applicants' approach but they quibble over the level of uncertainty regarding LEI's conclusions or the reliability of the modelling results. For purposes of the [SC]'s finding that the Project will not unduly interfere with the orderly development of the region, however, the critical point is the underlying agreement among the experts for the Applicants and CFP that significant benefits will accrue from the Project. Consequently, exploring the differing analyses relative to the capacity market may be intellectually stimulating but ultimately, the analyses do not need to be finely reconciled because such a reconciliation is not outcome determinative for the [SC]'s finding." PHM A. 2182.

[58] The Applicants' point was that there was agreement between their expert and the experts for CFP that the Project would yield significant benefits and that it was not necessary to "finely reconcile" differing capacity market analyses in order to conclude that the Project would not unduly interfere with ODR.

To be clear, this is not a case in which the Applicants are complaining that the SC weighed expert testimony and came to the wrong result. Rather, the Applicants contend that the SC "punted" on its obligation to weigh and balance the overall Project benefits by assuming a particular outcome and construing the Applicants' so-called "admission" as an excuse for not assessing this critical, potentially dispositive evidence. By failing to undertake any reasoned analysis of this issue, and failing to consider and resolve the "potential significant impacts and *benefits*," of the Project, the SC failed to satisfy its obligation to give "due consideration to all relevant information." RSA 162-H:16, IV.

5. The SC Created a New Burden of Proof Relative to the Views Expressed by Municipalities and Arbitrarily Deferred to their Opinions

RSA 162-H:16, IV(b) provides that the SEC must give "due consideration to the views of municipal and regional planning commissions and municipal governing bodies" when considering whether a project will unduly interfere with ODR. The statute and Site 301.15 thus place the burden on the SC to consider those views. Here, for the first time, the SC improperly shifted this burden to the Applicants, imposing on them the affirmative burden to address—and resolve—concerns voiced by municipal groups. The SC found that the Applicants failed to "adequately anticipate and account for the almost uniform view of those groups [municipalities] that the Project, as planned, would unduly interfere with [ODR]." Order A. 15 (emphasis added). This was a plain error of law and imposed a burden that was impossible to satisfy.

First, nothing in chapter 162-H or the SEC rules places any burden on the Applicants with respect to municipal views. Site 301.09 requires only that the Applicants

include the views of those bodies in "information regarding the effects of the [Project] on the orderly development of the region." The SC found, after considering those views, that the Applicants had not met their burden of proof because the overwhelming majority of them were "vehemently" opposed to the Project. *Id.* A. 293.[59] The SC does not (perhaps because it cannot) describe how the Applicants could satisfy that burden, stating only that "[w]e agree with the municipalities in this case that, given the magnitude of this Project, more consideration of the provisions of master plans and ordinances was required." *Id.* A. 289. What is unclear is where in the law or SEC rules there is any sliding scale that directs applicants to give more or less consideration of municipal views in proportion to the given magnitude of any project. Not only did the SC create a new requirement for an applicant to consider municipal views in some precise manner, it opaquely directs that "more" consideration was required. It remains equally unclear what that "more consideration" might be, or what form or extent it might take.

While claiming that the SEC was not required to defer to the views of municipalities, it is apparent that it in fact deferred to those opinions based on their vehemence and the number of towns or commissions that raised objections. Such deference is unmistakably contrary to the statutory mandate that the SEC give only "due consideration" to such views. This is precisely why the Legislature provided the SEC

[59] During deliberations, Commissioner Bailey stated: "we really do have to take into account the views of municipal officials, and those have all been very negative and have in many cases demonstrated their belief that this is not consistent with their master plans, their zoning ordinances. So, therefore, I don't think that the Applicant has met is burden of proof with respect to that either." DT A. 1506 (emphasis added).

with preemptive authority.[60] If decisions are to be made based on the arbitrary tabulation of vehement municipal opinions and assertions, no project could ever be built.

Second, although the contours of the burden imposed by the SC to satisfy the municipalities are not clear, in this case it is clear that this burden was impossible to meet. As Chairman Honigberg explained during deliberations, the Applicants "want to be able to work with the towns. The towns are stiff-arming them … so they're not able to make any kind of agreements right now." A. 1090-1091.[61] Under the SC's reasoning, the Applicants failed to meet their burden because they needed to do more to satisfy the towns, yet the towns were free to fail to cooperate and continue their "stiff-arming." The imposition of such a burden is contrary to the statute and SEC rules, and is unreasonable.

[60] Only one court has interpreted the meaning and definition of "due consideration." The Vermont Supreme Court, interpreting Vermont's corresponding siting statute (which contains language nearly identical to RSA 162-H:16, IV (b)), has consistently found the phrase "due consideration" in the context of orderly development of the region to "at least impliedly postulate that municipal enactments, in the specific area, are advisory rather than controlling." City of Burlington v. Vt. Elec. Power Co., 133 Vt. 438, 447 (1975); *see also* In re UPC Vermont Wind, LLC, 185 Vt. 296, 305 (2009). A more recent opinion explained that the statute's "admonition that the Board must afford the Town's standards 'due consideration' is reminiscent of the phrase, 'with all due respect,' which invariably precedes and qualifies a statement evincing little to no respect at all." In re Petition of Rutland Renewable Energy, 202 Vt. 59, 75 (2016) (Robinson, J., concurring). Justice Robinson explained that the permitting process "preempts municipal zoning altogether – an aspect of the statutory structure that further undermines any suggestion that the Board owes deference to the Town's solar siting standards." *Id.* at 76.

[61] As one example of this problem, throughout the hearings and SC deliberations, extensive attention was paid to the concerns the impact of construction would have on Main Street businesses in the Town of Plymouth. Between January and May of 2016 the Applicants presented three alternatives to Plymouth each of which would have relocated the Project off of Main Street, thereby alleviating the Town's concerns. Yet the Plymouth Board of Selectmen refused to work with the Applicants, deciding instead that it would not "talk with [them] about an alternative route or anything else." DT A. 825. The SC noted that Plymouth's Main Street was not the Applicants' "preferred place" for the Project and that "part of the problem is that there are some [towns] that are just holding out on the discussion. And maybe it's working." *Id.* A. 1151.

6. The SC Created a New Obligation Relative to Construction and Found Undue Interference Based on Concerns over 4.5 Miles of Unpaved Local Roads

The SC devoted nearly a fifth of its Order to whether the short term and temporary effects of "construction" of the Project would interfere with ODR. Order at 73-120. This analysis plucked "construction" out of the preface to Site 301.15 (a), elevating it to a separate criterion. This was plain error.

"Construction" is not a factor subject to any burden of proof. Site 301.15 requires that the SC consider the "extent to which…construction…will affect land use, employment and the economy of the region." But nothing in SEC rules requires (or allows) imposition of a separate burden of proof regarding the impact of construction generally, or of traffic in particular. By treating "construction" in this manner, the SC assigned a new burden of proof not present in the rules, and one that no previous applicant had been required to satisfy.[62]

The SC's finding that the Applicants did not meet this new burden cannot be reconciled with the SC's deliberations on this issue. The discussion of construction and traffic was led by William Oldenburg, the Assistant Director of Project Development for the DOT. He stated: "I don't think the construction will unduly interfere with [ODR]." A. 1498. He repeated this opinion in the rehearing deliberations, adding (with respect to

[62] Issues related to construction and traffic management and the crossing of public highways primarily concern the effect on public health and safety, not ODR, and the SEC has historically reviewed applications this way. In the MVRP docket, the subcommittee specifically addressed traffic management and the crossing of locally-maintained highways as matters of public safety. *Decision Granting Application for Certificate of Site and Facility, MVRP*, Docket No. 2015-05, A. 2142-2143 (October 4, 2016). This SC had no basis for treating the issues differently in this proceeding.

the impact of underground construction and the closure of local roads): "So if this was going to impact the region, so every DOT project impacts the region…I didn't think it would affect the region any more than any other roadway project." A. 1683-1684. Not a single member of the SC disagreed. How the SC got from there, to a finding that the Applicants had not met the alleged burden concerning whether short term, temporary "traffic interference caused by construction" would unduly interfere with orderly development of some indeterminate region is a mystery.[63]

Even more mysterious is how the SC reached its sole finding in more than 350 pages of Orders that the Project actually "would unduly interfere with the orderly development of the region." Order A. 291. The finding involved the options or conditions offered by the Applicants for managing construction in locally-maintained unpaved roads. No member of the SC suggested (let alone stated) this conclusion during deliberations. On the contrary, the Chairman said that the SEC "had lots of power" and could establish conditions "however it made the most sense." DT A. 908. The finding of undue interference with ODR in this section of the Order appears out of thin air and is absurd on its face. The issue involved only 4.5 miles of locally maintained and unpaved roads, a segment of which is closed each winter. How is it possible that temporary construction in those roads would unduly interfere with orderly development in a "region"? The finding is so arbitrary as to call into question every other finding

[63] By reaching findings never discussed in the deliberations the SC violated its obligation to deliberate in public under RSA 91-A:2. If the SC can make findings of fact and law on matters it never discussed in public, what is the point of public deliberations?

concerning ODR and reinforces the conclusion that the SC had no idea how to define this key term in RSA 162-H:16, IV.

Conclusion

This proceeding is a textbook case of arbitrary administrative decision-making that violated RSA chapter 162-H and the Applicants' due process rights. The SC's deliberations occurred more than two years after the Application was filed. Until then, expediency was not a concern. Yet during deliberations, and after what is likely the longest administrative proceeding in the State's history, expediency took center stage. Principles of law, of precedent, of fairness and reasonableness were all casualties of that expediency.

Based on this process, and these Orders, future SEC applicants considering whether to invest millions of dollars developing an energy project would be wise to consider certain facts. There is no certainty that SEC subcommittees will evaluate an application against all statutory standards. Future applicants will need to prepare and present their applications in a regulatory vacuum where key terms are undefined, and where the SEC rules offer no guide. Past precedent is of variable value with applicants having to wait until deliberations to learn if any precedent governs or if something new emerges from whole cloth. Experts and methodologies accepted and relied upon in one case may be summarily rejected in the next. Relevant information may be entirely ignored by the SEC. Applicants will not be able to rely on their ability, or that of the SEC, to propose conditions to mitigate impacts. All an applicant will know is that "every case is different." Given this uncertain and shifting landscape, no reasonable person

would invest the time and resources to develop much-needed energy infrastructure in New Hampshire.

For these reasons, and those set forth herein, the Applicants request that this Court accept this appeal. The Applicants will further request, upon briefing, that the Court vacate the Orders and remand this matter to the SEC.

i. Certification of Issues Preserved

Every issue specifically raised herein has been presented to the SEC and has been properly preserved for appellate review by contemporaneous objection or a properly filed pleadings, including Motions for Rehearing dated February 28, 2018 and April 28, 2018.

Respectfully submitted,

NORTHERN PASS TRANSMISSION LLC

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
d/b/a EVERSOURCE INC.

By its attorneys,

McLANE MIDDLETON, PROFESSIONAL
ASSOCIATION

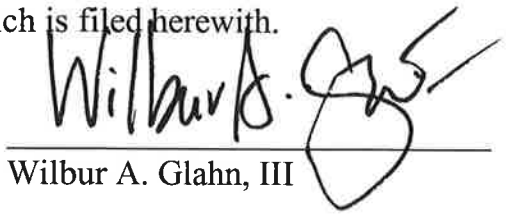
Dated: August 10, 2018

By: 

Wilbur A. Glahn, III, Bar No. 937
bill.glahn@mclane.com
Barry Needleman, Bar No. 9446
barry.needleman@mclane.com
Thomas B. Getz, Bar No. 923
thomas.getz@mclane.com
Rebecca S. Walkley, Bar No. 266258
rebecca.walkley@mclane.com
Viggo Fish, Bar No. 267579
viggo.fish@mclane.com
900 Elm Street, P.O. Box 326
Manchester, New Hampshire 03105-0326
Telephone: 603.625-6464

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2018, I served the foregoing Notice of Appeal and accompanying Appendix by email to the parties on the Service List attached to the Motion to Permit Electronic Service, which is filed herewith.



Wilbur A. Glahn, III

Addendum A to Applicants' Notice of Appeal

State Constitution - Bill of Rights

Part 1, Bill of Rights, of the New Hampshire State Constitution.

[Art.] 12. [Protection and Taxation Reciprocal.] Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary. But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. Nor are the inhabitants of this State controllable by any other laws than those to which they, or their representative body, have given their consent.

June 2, 1784

Amended 1964 by striking out reference to buying one's way out of military service.

[Art.] 15. [Right of Accused.] No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself. Every subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defense, by himself, and counsel. No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land; provided that, in any proceeding to commit a person acquitted of a criminal charge by reason of insanity, due process shall require that clear and convincing evidence that the person is potentially dangerous to himself or to others and that the person suffers from a mental disorder must be established. Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown; this right he is at liberty to waive, but only after the matter has been thoroughly explained by the court.

June 2, 1784

Amended 1966 to provide the right to counsel at state expense if the need is shown.
Amended 1984 reducing legal requirement proof beyond a reasonable doubt to clear and convincing evidence in insanity hearings.

Referenced from the N.H. Manual for the General Court No.65 2017

TITLE XII
PUBLIC SAFETY AND WELFARE

CHAPTER 162-H
ENERGY FACILITY EVALUATION, SITING, CONSTRUCTION AND OPERATION

Section 162-H:1

162-H:1 Declaration of Purpose. – The legislature recognizes that the selection of sites for energy facilities may have significant impacts on and benefits to the following: the welfare of the population, private property, the location and growth of industry, the overall economic growth of the state, the environment of the state, historic sites, aesthetics, air and water quality, the use of natural resources, and public health and safety. Accordingly, the legislature finds that it is in the public interest to maintain a balance among those potential significant impacts and benefits in decisions about the siting, construction, and operation of energy facilities in New Hampshire; that undue delay in the construction of new energy facilities be avoided; that full and timely consideration of environmental consequences be provided; that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans; and that the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion. In furtherance of these objectives, the legislature hereby establishes a procedure for the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy facilities.

Source. 1991, 295:1. 1998, 264:1. 2009, 65:1, eff. Aug. 8, 2009. 2014, 217:1, eff. July 1, 2014.

Section 162-H:2

162-H:2 Definitions. –

I. "Acceptance" means a determination by the committee that it finds that the application is complete and ready for consideration.

I-a. "Administrator" means the administrator of the committee established by this chapter.

I-b. "Affected municipality" means any municipality or unincorporated place in which any part of an energy facility is proposed to be located and any municipality or unincorporated place from which any part of the proposed energy facility will be visible or audible.

II. [Repealed.]

II-a. "Certificate" or "certificate of site and facility" means the document issued by the committee, containing such terms and conditions as the committee deems appropriate, that authorizes the applicant to proceed with the proposed site and facility.

III. "Commencement of construction" means any clearing of the land, excavation or other substantial action that would adversely affect the natural environment of the site of the proposed facility, but does not include land surveying, optioning or acquiring land or rights in land, changes desirable for temporary use of the land for public recreational uses, or necessary borings to determine foundation conditions, or other preconstruction monitoring to establish background information related to the suitability of the site or to the protection of environmental use and values.

IV. [Repealed.]

V. "Committee" means the site evaluation committee established by this chapter.

VI. "Energy" means power, including mechanical power, useful heat, or electricity derived from any resource, including, but not limited to, oil, coal, and gas.

VII. "Energy facility" means:

(a) Any industrial structure that may be used substantially to extract, produce, manufacture, transport or refine sources of energy, including ancillary facilities as may be used or useful in transporting, storing or otherwise providing for the raw materials or products of any such industrial structure. This shall include but not be limited to industrial structures such as oil refineries, gas plants, equipment and associated facilities designed to use any, or a combination of, natural gas, propane gas and liquefied natural gas, which store on site a quantity to provide 7 days of continuous operation at a rate equivalent to the energy requirements of a 30 megawatt electric generating station and its associated facilities, plants for coal conversion, onshore and offshore loading and unloading facilities for energy sources and energy transmission pipelines that are not considered part of a local distribution network.
(b) Electric generating station equipment and associated facilities designed for, or capable of, operation at any capacity of 30 megawatts or more.
(c) An electric transmission line of design rating of 100 kilovolts or more, associated with a generating facility under subparagraph (b), over a route not already occupied by a transmission line or lines.
(d) An electric transmission line of a design rating in excess of 100 kilovolts that is in excess of 10 miles in length, over a route not already occupied by a transmission line.
(e) A new electric transmission line of design rating in excess of 200 kilovolts.
(f) A renewable energy facility.
(g) Any other facility and associated equipment that the committee determines requires a certificate, consistent with the findings and purposes of RSA 162-H:1, either on its own motion or by petition of the applicant or 2 or more petitioners as defined in RSA 162-H:2, XI.
VII-a. "Energy facility proceeding time and expenses" means time spent in hearings, meetings, preparation, and travel related to any application or other proceeding before the committee concerning an energy facility, either existing or proposed, and related reasonable out-of-pocket expenses.
VIII. "Filing" means the date on which the application is first submitted to the committee.
IX. "Person" means any individual, group, firm, partnership, corporation, cooperative, municipality, political subdivision, government agency or other organization.
X. [Repealed.]
X-a. [Repealed.]
XI. "Petitioner" means a person filing a petition meeting any of the following conditions:
(a) A petition endorsed by 100 or more registered voters in the host community or host communities.
(b) A petition endorsed by 100 or more registered voters from abutting communities.
(c) A petition endorsed by the governing body of a host community or 2 or more governing bodies of abutting communities.
(d) A petition filed by the potential applicant.
XII. "Renewable energy facility" means electric generating station equipment and associated facilities designed for, or capable of, operation at a nameplate capacity of greater than 30 megawatts and powered by wind energy, geothermal energy, hydrogen derived from biomass fuels or methane gas, ocean thermal, wave, current, or tidal energy, methane gas, biomass technologies, solar technologies, or hydroelectric energy. "Renewable energy facility" shall also include electric generating station equipment and associated facilities of 30 megawatts or less nameplate capacity but at least 5 megawatts which the committee determines requires a certificate, consistent with the findings and purposes set forth in RSA 162-H:1, either on its own motion or by petition of the applicant or 2 or more petitioners as defined in RSA 162-H:2, XI.

Source. 1991, 295:1. 1997, 298:21-24. 1998, 264:2. 2007, 25:1; 364:3. 2008, 348:8. 2009, 65:2-4, 24, I-IV, eff. Aug. 8, 2009. 2014, 217:2-5, eff. July 1, 2014. 2015, 219:4, eff. July 8, 2015. 2017, 115:1, eff. Aug. 14, 2017.

Section 162-H:3

162-H:3 Site Evaluation Committee Established. –
I. There is hereby established a committee to be known as the New Hampshire site evaluation committee consisting of 9 members, as follows:
(a) The commissioners of the public utilities commission, the chairperson of which shall be the chairperson of the committee;
(b) The commissioner of the department of environmental services, who shall be the vice-chairperson of the

committee;
(c) The commissioner of the department of business and economic affairs or designee;
(d) The commissioner of the department of transportation;
(e) The commissioner of the department of natural and cultural resources, the director of the division of historical resources, or designee; and
(f) Two members of the public, appointed by the governor, with the consent of the council, at least one of whom shall be a member in good standing of the New Hampshire Bar Association, and both of whom shall be residents of the state of New Hampshire with expertise or experience in one or more of the following areas: public deliberative or adjudicative proceedings; business management; environmental protection; natural resource protection; energy facility design, construction, operation, or management; or community and regional planning or economic development.
II. The public members shall serve 4-year terms and until their successors are appointed and qualified. The initial term of one member shall be 2 years. Any public member chosen to fill a vacancy occurring other than by expiration of term shall be appointed for the unexpired term of the member who is to be succeeded.
III. No public member nor any member of his or her family shall receive income from energy facilities within the jurisdiction of the committee. The public members shall comply with RSA 15-A and RSA 15-B.
IV. All members shall refrain from ex parte communications regarding any matter pending before the committee.
V. Seven members of the committee shall constitute a quorum for the purpose of conducting the committee's business.
VI. Any public member of the committee may be removed by the governor and council for inefficiency, neglect of duty, or misconduct or malfeasance in office, after being given a written statement of the charges and an opportunity to be heard.
VII. The committee shall be administratively attached to the public utilities commission pursuant to RSA 21-G:10.
VIII. [Repealed.]
IX. The chairperson shall serve as the chief executive of the committee and may:
(a) Delegate to other members the duties of presiding officer, as appropriate.
(b) Perform administrative actions for the committee, as may a presiding officer.
(c) Establish, with the consent of the committee, the budgetary requirements of the committee.
(d) Engage personnel in accordance with this chapter.
(e) Form subcommittees pursuant to RSA 162-H:4-a.
X. An alternate public member who satisfies the qualification requirements of subparagraph I(f), excluding the New Hampshire Bar membership requirement, shall be appointed by the governor, with consent of the council. The alternate public member shall only sit on the committee or a subcommittee as provided for in paragraph XI.
XI. If at any time a member must recuse himself or herself on a matter or is not otherwise available for good reason, such person, if a state employee, may designate a senior administrative employee or a staff attorney from his or her agency to sit on the committee. In the case of a public member, the chairperson shall appoint the alternate public member, or if such member is not available, the governor and council shall appoint a replacement upon petition of the chairperson. The replacement process under this paragraph shall also be applicable to subcommittee members under RSA 162-H:4-a.

Source. 1991, 295:1. 1995, 310:182. 1996, 228:41. 1997, 298:25. 2002, 247:2. 2003, 319:9. 2004, 257:44. 2007, 364:4. 2009, 65:5, eff. Aug. 8, 2009. 2014, 217:6, eff. July 1, 2014. 2015, 219:2, eff. July 8, 2015. 2017, 156:61, eff. July 1, 2017.

Section 162-H:3-a

162-H:3-a Administrator and Other Committee Support. – There is hereby established within the site evaluation committee the position of administrator who shall be an unclassified state employee. In the alternative, the position may be filled by an independent contractor. The administrator shall be hired by and under the supervision of the chairperson. The administrator, or chairperson in the absence of an administrator, with committee approval, may engage additional technical, legal, or administrative support to fulfill the functions of the committee as necessary. Any person to be hired by the administrator shall be approved by the chairperson.

Source. 2014, 217:7, eff. July 1, 2014. 2015, 219:3, eff. July 8, 2015.

Section 162-H:4

162-H:4 Powers and Duties of the Committee. –

I. The committee shall:

(a) Evaluate and issue any certificate under this chapter for an energy facility.

(b) Determine the terms and conditions of any certificate issued under this chapter.

(c) Monitor the construction and operation of any energy facility granted a certificate under this chapter to ensure compliance with such certificate.

(d) Enforce the terms and conditions of any certificate issued under this chapter.

(e) Assist the public in understanding the requirements of this chapter.

II. The committee shall hold hearings as required by this chapter and such additional hearings as it deems necessary and appropriate.

III. The committee may delegate the authority to monitor the construction or operation of any energy facility granted a certificate under this chapter to the administrator or such state agency or official as it deems appropriate, but shall ensure that the terms and conditions of the certificate are met. Any authorized representative or delegate of the committee shall have a right of entry onto the premises of any part of the energy facility to ascertain if the facility is being constructed or operated in continuing compliance with the terms and conditions of the certificate. During normal hours of business administration and on the premises of the facility, such a representative or delegate shall also have a right to inspect such records of the certificate-holder as are relevant to the terms or conditions of the certificate.

III-a. The committee may delegate to the administrator or such state agency or official as it deems appropriate the authority to specify the use of any technique, methodology, practice, or procedure approved by the committee within a certificate issued under this chapter, or the authority to specify minor changes in the route alignment to the extent that such changes are authorized by the certificate for those portions of a proposed electric transmission line or energy transmission pipeline for which information was unavailable due to conditions which could not have been reasonably anticipated prior to the issuance of the certificate.

III-b. The committee may not delegate its authority or duties, except as provided under this chapter.

IV. In cases where the committee determines that other existing statutes provide adequate protection of the objectives of RSA 162-H:1, the committee may, within 60 days of acceptance of the application, or filing of a request for exemption with sufficient information to enable the committee to determine whether the proposal meets the requirements set forth below, and after holding a public hearing in a county where the energy facility is proposed, exempt the applicant from the approval and certificate provisions of this chapter, provided that the following requirements are met:

(a) Existing state or federal statutes, state or federal agency rules or municipal ordinances provide adequate protection of the objectives of RSA 162-H:1;

(b) A review of the application or request for exemption reveals that consideration of the proposal by only selected agencies represented on the committee is required and that the objectives of RSA 162-H:1 can be met by those agencies without exercising the provisions of RSA 162-H;

(c) Response to the application or request for exemption from the general public indicates that the objectives of RSA 162-H:1 are met through the individual review processes of the participating agencies; and

(d) All environmental impacts or effects are adequately regulated by other federal, state, or local statutes, rules, or ordinances.

V. In any matter before the committee, the presiding officer, or a hearing officer designated by the presiding officer, may hear and decide procedural matters that are before the committee, including procedural schedules, consolidation of parties with substantially similar interests, discovery schedules and motions, and identification of significant disputed issues for hearing and decision by the committee. Undisputed petitions for intervention may be decided by the hearing officer and disputed petitions shall be decided by the presiding officer. Any party aggrieved by a decision on a petition to intervene may within 10 calendar days request that the committee review such decision. Other procedural decisions may be reviewed by the committee at its discretion.

Source. 1991, 295:1. 1997, 298:26. 2007, 364:5. 2008, 348:7. 2009, 65:6-8, eff. Aug. 8, 2009. 2014, 217:8-10, eff. July 1, 2014.

Section 162-H:4-a

162-H:4-a Subcommittees. –
I. The chairperson may establish subcommittees to consider and make decisions on applications, including the issuance of certificates, or to exercise any other authority or perform any other duty of the committee under this chapter, except that no subcommittee may approve the budgetary requirements of the committee, approve any support staff positions, or adopt initial or final rulemaking proposals. For purposes of statutory interpretation and executing the regulatory functions of this chapter, the subcommittee shall assume the role of and be considered the committee, with all of its associated powers and duties in order to execute the charge given it by the chairperson.
II. When considering the issuance of a certificate or a petition of jurisdiction, a subcommittee shall have no fewer than 7 members. The 2 public members shall serve on each subcommittee with the remaining 5 or more members selected by the chairperson from among the state agency members of the committee. Each selected member may designate a senior administrative employee or staff attorney from his or her respective agency to sit in his or her place on the subcommittee. The chairperson shall designate one member or designee to be the presiding officer who shall be an attorney whenever possible. Five members of the subcommittee shall constitute a quorum for the purpose of conducting the subcommittee's business.
III. In any matter not covered under paragraph II, the chairperson may establish subcommittees of 3 members, consisting of 2 state agency members and one public member. Each state agency member may designate a senior administrative employee or staff attorney from his or her agency to sit in his or her place on the subcommittee. The chairperson shall designate one member or designee to be the presiding officer who shall be an attorney whenever possible. Two members of the subcommittee shall constitute a quorum. Any party whose interests may be affected may object to the matter being assigned to a 3-person subcommittee no less than 14 days before the first hearing. If objection is received, the chairperson shall remove the matter from the 3-person subcommittee and either assign it to a subcommittee formed under paragraph II or have the full committee decide the matter.

Source. 2014, 217:11, eff. July 1, 2014. 2015, 219:9, eff. July 8, 2015.

Section 162-H:5

162-H:5 Prohibitions and Restrictions. –
I. No person shall commence to construct any energy facility within the state unless it has obtained a certificate pursuant to this chapter. Such facilities shall be constructed, operated and maintained in accordance with the terms of the certificate. Such certificates are required for sizeable changes or additions to existing facilities. Such a certificate shall not be transferred or assigned without approval of the committee.
II. Facilities certified pursuant to RSA 162-F or RSA 162-H prior to January 1, 1992, shall be subject to the provisions of those chapters; however, sizable changes or additions to such facilities shall be certified pursuant to this chapter.
III. The applications shall be governed by the applicable laws, rules and regulations of the agencies and shall be subject to the provisions of RSA 162-F or RSA 162-H in effect on the date of filing. Notwithstanding the foregoing, an applicant may request the site evaluation committee to assume jurisdiction and in the event that the site evaluation committee agrees to assert jurisdiction, the facility shall be subject to the provisions of this chapter.
IV. [Repealed.]

Source. 1991, 295:1. 1998, 264:3. 2009, 65:9, 24, V, eff. Aug. 8, 2009.

Section 162-H:6

162-H:6 Time Frames. – [Repealed 2009, 65:24, VI, eff. Aug. 8, 2009.]

Section 162-H:6-a

162-H:6-a Time Frames for Review of Renewable Energy Facilities. – [Repealed 2014, 217:28, II, eff. July 1, 2014.]

Section 162-H:7

162-H:7 Application for Certificate. –

I. [Repealed.]

II. All applications for a certificate for an energy facility shall be filed with the chairperson of the site evaluation committee.

III. Upon filing of an application, the committee shall expeditiously conduct a preliminary review to ascertain if the application contains sufficient information to carry out the purposes of this chapter. If the application does not contain such sufficient information, the committee shall, in writing, expeditiously notify the applicant of that fact and specify what information the applicant must supply.

IV. Each application shall contain sufficient information to satisfy the application requirements of each state agency having jurisdiction, under state or federal law, to regulate any aspect of the construction or operation of the proposed facility, and shall include each agency's completed application forms. Upon the filing of an application, the committee shall expeditiously forward a copy to the state agencies having permitting or other regulatory authority and to other state agencies identified in administrative rules. Upon receipt of a copy, each agency shall conduct a preliminary review to ascertain if the application contains sufficient information for its purposes. If the application does not contain sufficient information for the purposes of any of the state agencies having permitting or other regulatory authority, that agency shall, in writing, notify the committee of that fact and specify what information the applicant must supply; thereupon the committee shall provide the applicant with a copy of such notification and specification. Notwithstanding any other provision of law, for purposes of the time limitations imposed by this section, any application made under this section shall be deemed not accepted either by the committee or by any of the state agencies having permitting or other regulatory authority if the applicant is reasonably notified that it has not supplied sufficient information for any of the state agencies having permitting or other regulatory authority in accordance with this paragraph.

V. Each application shall also:

(a) Describe in reasonable detail the type and size of each major part of the proposed facility.

(b) Identify both the applicant's preferred choice and other alternatives it considers available for the site and configuration of each major part of the proposed facility and the reasons for the applicant's preferred choice.

(c) Describe in reasonable detail the impact of each major part of the proposed facility on the environment for each site proposed.

(d) Describe in reasonable detail the applicant's proposals for studying and solving environmental problems.

(e) Describe in reasonable detail the applicant's financial, technical, and managerial capability for construction and operation of the proposed facility.

(f) Document that written notification of the proposed project, including appropriate copies of the application, has been given to the appropriate governing body of each affected municipality, as defined in RSA 162-H:2, I-b. The application shall include a list of the affected municipalities.

(g) Describe in reasonable detail the elements of and financial assurances for a facility decommissioning plan.

(h) Provide such additional information as the committee may require to carry out the purposes of this chapter.

VI. The committee shall decide whether or not to accept the application within 60 days of filing. If the committee rejects an application because it determines it to be administratively incomplete, the applicant may choose to file a new and more complete application or cure the defects in the rejected application within 10 days of receipt of notification of rejection.

VI-a. Public information sessions shall be held in accordance with RSA 162-H:10.

VI-b. All state agencies having permitting or other regulatory authority shall report their progress to the committee within 150 days of the acceptance of the application, outlining draft permit conditions and specifying additional data requirements necessary to make a final decision on the parts of the application that relate to its permitting or other regulatory authority.

VI-c. All state agencies having permitting or other regulatory authority shall make and submit to the committee a final decision on the parts of the application that relate to its permitting and other regulatory authority, no later than 240 days after the application has been accepted.

VI-d. Within 365 days of the acceptance of an application, the committee shall issue or deny a certificate for an

energy facility.
VI-e. [Repealed.]
VII. Notwithstanding any other provision of law, the application shall be in lieu of separate applications that may be required by any other state agencies.
VIII. This chapter shall not preclude an agency from imposing its usual statutory fees.
IX. The applicant shall immediately inform the committee of any substantive modification to its application.

Source. 1991, 295:1. 2009, 65:11-13, 24, VII, eff. Aug. 8, 2009. 2014, 217:12-14, 28, III, eff. July 1, 2014. 2017, 115:2, eff. Aug. 14, 2017.

Section 162-H:7-a

162-H:7-a Role of State Agencies. –
I. State agencies having permitting or other regulatory authority may participate in committee proceedings as follows:
(a) Receive proposals or permit requests within the agency's permitting or other regulatory authority, expertise, or both; determine completeness of elements required for such agency's permitting or other programs; and report on such issues to the committee;
(b) Review proposals or permit requests and submit recommended draft permit terms and conditions to the committee;
(c) Identify issues of concern on the proposal or permit request or notify the committee that the application raises no issues of concern;
(d) When issues of concern are identified by the agency or committee, designate one or more witnesses to appear before the committee at a hearing to provide input and answer questions of parties and committee members; and
(e) If the committee intends to impose certificate conditions that are different than those proposed by state agencies having permitting or other regulatory authority, the committee shall promptly notify the agency or agencies in writing to seek confirmation that such conditions or rulings are in conformity with the laws and regulations applicable to the project and state whether the conditions or rulings are appropriate in light of the agency's statutory responsibilities. The notified state agencies shall respond to the committee's request for confirmation as soon as possible, but no later than 10 calendar days from the date the agency or agencies receive the notification described above.
II. When initiating a proceeding for a committee matter, the committee shall expeditiously notify state agencies having permitting or other regulatory authority or that are identified in administrative rules.
III. Within 30 days of receipt of a notification of proceeding, a state agency not having permitting or other regulatory authority but wishing to participate in the proceeding shall advise the presiding officer of the committee in writing of such desire and be allowed to do so provided that the presiding officer determines that a material interest in the proceeding is demonstrated and such participation conforms with the normal procedural rules of the committee.
IV. The commissioner or director of each state agency that intends to participate in a committee proceeding shall advise the presiding officer of the name of the individual on the agency's staff designated to be the agency liaison for the proceeding. The presiding officer may request the attendance of an agency's designated liaison at a session of the committee if that person could materially assist the committee in its examination or consideration of a matter.
V. All communications between the committee and agencies regarding a pending committee matter shall be included in the official record and be publicly available.
VI. A state agency may intervene as a party in any committee proceeding in the same manner as other persons under RSA 541-A. An intervening agency shall have the right to rehearing and appeal of a certificate or other decision of the committee.

Source. 2014, 217:15, eff. July 1, 2014.

Section 162-H:8

162-H:8 Disclosure of Ownership. –
Any application for a certificate shall be signed and sworn to by the person or executive officer of the association or corporation making such application and shall contain the following information:
I. Full name and address of the person, association, or corporation.
II. If an association, the names and residences of the members of the association.
III. If a corporation, the name of the state under which it is incorporated with its principal place of business and the names and addresses of its directors, officers and stockholders.
IV. The location or locations where an applicant is to conduct its business.
V. A statement of assets and liabilities of the applicant and other relevant financial information of such applicant.

Source. 1991, 295:1, eff. Jan. 1, 1992.

Section 162-H:8-a

162-H:8-a Application and Filing Fees. –
I. Except as provided in paragraph IV, a person filing with the committee an application for a certificate for an energy facility, a petition for jurisdiction, a request for exemption, or any other petition or request for the committee to take action, shall pay to the committee at the time of filing a fee determined in accordance with the fee schedule described in paragraph II. If an application for a certificate for an energy facility is deemed incomplete pursuant to RSA 162-H:7, VI, and a new application is submitted thereunder, the unearned portion of the initial application fee shall be refunded to the applicant or credited to the filing of the new application. The committee may in its discretion provide for a credit or refund in other circumstances that are unforeseen by the applicant.
II. The fees under paragraph I shall be determined in accordance with a fee schedule posted by the committee on its website, which shall include the following amounts, subject to subsequent modification under paragraph III:
(a) Application fee for electric generation facilities: $50,000 base charge, plus:
(1) $1,000 per megawatt for the first 40 megawatts, and $1,500 per megawatt for each megawatt in excess of 40 megawatts, for any wind energy system.
(2) $100 per megawatt, for any natural gas or biomass fueled facility.
(3) $150 per megawatt, for any coal or oil fueled facility.
(4) $200 per megawatt, for any nuclear generation facility.
(b) Application fee for transmission facilities: $50,000 base charge, plus:
(1) $3,000 per mile, for any electric transmission facility.
(2) $1,500 per mile, for any natural gas pipeline.
(c) Application fee for other energy facilities: $50,000 fee.
(d) Filing fees for administrative proceedings:
(1) Petition for committee jurisdiction: $10,500.
(2) Petition for declaratory ruling: $10,500, or $3,000 if heard by a 3-member subcommittee.
(3) Certificate transfer of ownership: $10,500, or $3,000 if heard by a 3-member subcommittee.
(4) Request for exemption: $10,500, or $3,000 if heard by a 3-member subcommittee.
(5) Request to modify a certificate: $10,500, or $3,000 if heard by a 3-member subcommittee.
III. The committee shall review and evaluate the application fees and filing fees in the fee schedule in paragraph II at least once each year. The committee may increase or decrease any amount in the fee schedule by up to 20 percent with prior approval of the fiscal committee of the general court, provided that any such increase or decrease shall occur not more frequently than once during any 12-month period. Modifications to the fee schedule shall be posted on the committee website, with a link prominently displayed on the home page.
IV. Notwithstanding paragraph I, a petition for committee jurisdiction filed by a petitioner as defined in RSA 162-H:2, XI(a), (b), or (c) for a certificate for an energy facility shall not be subject to a filing fee. If the committee determines that it has jurisdiction over a proposed energy facility subject to any such petition, then the owner of the proposed energy facility shall be required to pay to the committee the petition for jurisdiction fee, in addition to the application fee determined in accordance with paragraph II for the type and size of the proposed energy facility.

Source. 2015, 219:8, eff. July 8, 2015.

Section 162-H:9

162-H:9 Counsel for the Public. –
I. Upon notification that an application for a certificate has been filed with the committee in accordance with RSA 162-H:7, the attorney general shall appoint an assistant attorney general as a counsel for the public. The counsel shall represent the public in seeking to protect the quality of the environment and in seeking to assure an adequate supply of energy. The counsel shall be accorded all the rights and privileges, and responsibilities of an attorney representing a party in formal action and shall serve until the decision to issue or deny a certificate is final.
II. This section shall not be construed to prevent any person from being heard or represented by counsel; provided, however, the committee may compel consolidation of representation for such persons as have, in the committee's reasonable judgment, substantially identical interests.

Source. 1991, 295:1, eff. Jan. 1, 1992.

Section 162-H:10

162-H:10 Public Hearing; Studies; Rules. –
I. At least 30 days prior to filing an application for a certificate, an applicant shall hold at least one public information session in each county where the proposed facility is to be located and shall, at a minimum, publish a public notice not less than 14 days before such session in one or more newspapers having a regular circulation in the county in which the session is to be held, describing the nature and location of the proposed facility. The applicant shall also send a copy of the public notice, not less than 14 days before the session, by first class mail to the governing body of each affected municipality. At such session, the applicant shall present information regarding the project and provide an opportunity for comments and questions from the public to be addressed by the applicant. Not less than 10 days before such session, the applicant shall provide a copy of the public notice to the chairperson of the committee. The applicant shall arrange for a transcript of such session to be prepared and shall include the transcript in its application for a certificate.
I-a. Within 45 days after acceptance of an application for a certificate, pursuant to RSA 162-H:7, the applicant shall hold at least one public information session as described in paragraph I in each county in which the proposed facility is to be located and shall, at a minimum, publish a public notice not less than 14 days before said session in one or more newspapers having a regular circulation in the county in which the session is to be held, describing the nature and location of the proposed facility. The applicant shall also send a copy of the public notice, not less than 14 days before the session, by first class mail to the governing body of each affected municipality. Not less than 10 days before such session, the applicant shall provide a copy of the public notice to the presiding officer of the committee. The administrator, or a designee of the presiding officer of the committee, shall act as presiding officer of the information session. The session shall be for public information on the proposed facility with the applicant presenting the information to the public. The presiding officer shall also explain to the public the process the committee will use to review the application for the proposed facility.
I-b. Upon request of the governing body of a municipality or unincorporated place in which any part of the proposed facility is to be located, or on the committee's own motion, the committee may order the applicant to provide such additional public information sessions as described in paragraph I as are reasonable to inform the public of the proposed project.
I-c. Within 90 days after acceptance of an application for a certificate, pursuant to RSA 162-H:7, the site evaluation committee shall hold at least one public hearing in each county in which the proposed facility is to be located and shall publish a public notice not less than 14 days before such hearing in one or more newspapers having a regular circulation in the county in which the hearing is to be held, describing the nature and location of the proposed facilities. The committee shall also send a copy of the public notice, not less than 14 days before the hearing, by first class mail to the governing body of each affected municipality. The public hearings shall be joint hearings, with representatives of the agencies that have permitting or other regulatory authority over the subject matter and shall be deemed to satisfy all initial requirements for public hearings under statutes requiring permits relative to environmental impact. Notwithstanding any other provision of law, the hearing shall be a joint hearing with the other state agencies and shall be in lieu of all hearings otherwise required by any of the

other state agencies; provided, however, if any of such other state agencies does not otherwise have authority to conduct hearings, it may not join in the hearing under this chapter; provided further, however, the ability or inability of any of the other state agencies to join shall not affect the composition of the committee under RSA 162-H:3 nor the ability of any member of the committee to act in accordance with this chapter.
II. Subsequent public hearings shall be in the nature of adjudicative proceedings under RSA 541-A and shall be held in the county or one of the counties in which the proposed facility is to be located or in Concord, New Hampshire, as determined by the site evaluation committee. The committee shall give adequate public notice of the time and place of each subsequent hearing.
III. The site evaluation committee shall consider and weigh all evidence presented at public hearings and shall consider and weigh written information and reports submitted to it by members of the public before, during, and subsequent to public hearings but prior to the closing of the record of the proceeding. The committee shall provide an opportunity at one or more public hearings for comments from the governing body of each affected municipality and residents of each affected municipality. The committee shall consider, as appropriate, prior committee findings and rulings on the same or similar subject matters, but shall not be bound thereby.
IV. The site evaluation committee shall require from the applicant whatever information it deems necessary to assist in the conduct of the hearings, and any investigation or studies it may undertake, and in the determination of the terms and conditions of any certificate under consideration.
V. The site evaluation committee and counsel for the public shall conduct such reasonable studies and investigations as they deem necessary or appropriate to carry out the purposes of this chapter and may employ a consultant or consultants, legal counsel and other staff in furtherance of the duties imposed by this chapter, the cost of which shall be borne by the applicant in such amount as may be approved by the committee. The site evaluation committee and counsel for the public are further authorized to assess the applicant for all travel and related expenses associated with the processing of an application under this chapter.
VI. The site evaluation committee shall issue such rules to administer this chapter, pursuant to RSA 541-A, after public notice and hearing, as may from time to time be required.
VII. As soon as practicable but no later than November 1, 2015, the committee shall adopt rules, pursuant to RSA 541-A, relative to the organization, practices, and procedures of the committee and criteria for the siting of energy facilities, including specific criteria to be applied in determining if the requirements of RSA 162-H:16, IV have been met by the applicant for a certificate of site and facility. Prior to the adoption of such rules, the office of strategic initiatives shall hire and manage one or more consultants to conduct a public stakeholder process to develop recommended regulatory criteria, which may include consideration of issues identified in attachment C of the 2008 final report of the state energy policy commission, as well as others that may be identified during the stakeholder process. Except for the cases where the adjudicatory hearing has commenced, applications pending on the date rules adopted under this paragraph take effect shall be subject to such rules. Prior to the adoption of rules under this paragraph, applications shall be continuously processed pursuant to the rules in effect upon the date of filing. If the rules require the submission of additional information by an applicant, such applicant shall be afforded a reasonable opportunity to provide that information while the processing of the application continues.

Source. 1991, 295:1. 1997, 298:27. 2007, 364:7. 2009, 65:14. 2013, 134:2, eff. June 26, 2013. 2014, 217:16, eff. July 1, 2014. 2015, 219:11, eff. July 8, 2015; 268:3, eff. July 20, 2015. 2017, 115:3, 4, eff. Aug. 14, 2017; 156:64, eff. July 1, 2017.

Section 162-H:10-a

162-H:10-a Wind Energy Systems. –
I. To meet the objectives of this chapter, and with due regard for the renewable energy goals of RSA 362-F, including promoting the use of renewable resources, reducing greenhouse gas and other air pollutant emissions, and addressing dependence on imported fuels, the general court finds that appropriately sited and conditioned wind energy systems subject to committee approval have the potential to assist the state in accomplishing these goals. Accordingly, the general court finds that it is in the public interest for the site evaluation committee to establish criteria or standards governing the siting of wind energy systems in order to ensure that the potential benefits of such systems are appropriately considered and unreasonable adverse effects avoided through a comprehensive, transparent, and predictable process. When establishing any criteria, standard, or rule for a wind

energy system or when specifying the type of information that a wind energy applicant shall provide to the committee for its decision-making, the committee shall rely upon the best available evidence.
II. For the adoption of rules, pursuant to RSA 541-A, relative to the siting of wind energy systems, the committee shall address the following:
(1) Visual impacts as evaluated through a visual impact assessment prepared in accordance with professional standards by an expert in the field.
(2) Cumulative impacts to natural, scenic, recreational, and cultural resources from multiple towers or projects, or both.
(3) Health and safety impacts, including but not limited to, shadow flicker caused by the interruption of sunlight passing through turbine blades and ice thrown from blades.
(4) Project-related sound impact assessment prepared in accordance with professional standards by an expert in the field.
(5) Impacts to the environment, air and water quality, plants, animals and natural communities.
(6) Site fire protection plan requirements.
(7) Site decommissioning, including sufficient and secure funding, removal of structures, and site restoration.
(8) Best practical measures to avoid, minimize, or mitigate adverse effects.

Source. 2014, 310:5, eff. Aug. 1, 2014.

Section 162-H:10-b

162-H:10-b Siting of High Pressure Gas Pipelines; Rulemaking; Intervention. –
I. To meet the objectives of this chapter, and with due regard to meeting the energy needs of the residents and businesses of New Hampshire, the general court finds that appropriately sited high pressure gas pipelines subject to committee approval have the potential to assist the state in accomplishing these goals. Accordingly, the general court finds that it is in the public interest for the site evaluation committee to establish criteria or standards governing the siting of high pressure gas pipelines in order to ensure that the potential benefits of such systems are appropriately considered and unreasonable adverse effects avoided through a comprehensive, transparent, and predictable process. When establishing any criteria, standard, or rule for a high pressure gas pipeline or when specifying the type of information that a high pressure gas pipeline applicant shall provide to the committee for its decision-making, the committee shall rely upon the best available evidence.
II. For the adoption of rules, pursuant to RSA 541-A, relative to the siting of high pressure gas pipelines, the committee shall address the following:
(a) Impacts to natural, scenic, recreational, visual, and cultural resources.
(b) Health and safety impacts, including but not limited to, proximity to high pressure gas pipelines that could be mitigated by appropriate setbacks from any high pressure gas pipeline.
(c) Project-related sound and vibration impact assessment prepared in accordance with professional standards by an expert in the field.
(d) Impacts to the environment, air and water quality, plants, animals, and natural communities.
(e) Site fire protection plan requirements.
(f) Best practical measures to ensure quality construction that minimizes safety issues.
(g) Best practical measures to avoid, minimize, or mitigate adverse effects.
(h) Criteria to maintain property owners' ability to use and enjoy their property.
III. As soon as practicable, but no later than one year from the effective date of this section, the committee shall adopt rules, pursuant to RSA 541-A, consistent with paragraphs I and II of this section.
IV. The committee shall consider intervention in Federal Energy Regulatory Commission proceedings involving the siting of high pressure gas pipelines in order to protect the interest of the state of New Hampshire.

Source. 2015, 264:1, eff. July 20, 2015.

Section 162-H:11

162-H:11 Judicial Review. – Decisions made pursuant to this chapter shall be reviewable in accordance with RSA 541.

Source. 1991, 295:1, eff. Jan. 1, 1992.

Section 162-H:12

162-H:12 Enforcement. –
I. Whenever the committee, or the administrator as designee, determines that any term or condition of any certificate issued under this chapter is being violated, it shall, in writing, notify the person holding the certificate of the specific violation and order the person to immediately terminate the violation. If, 15 days after receipt of the order, the person has failed or neglected to terminate the violation, the committee may suspend the person's certificate. Except for emergencies, prior to any suspension, the committee shall give written notice of its consideration of suspension and of its reasons therefor and shall provide opportunity for a prompt hearing.
II. The committee may suspend a person's certificate if the committee determines that the person has made a material misrepresentation in the application or, in the supplemental or additional statements of fact or studies required of the applicant, or if the committee determines that the person has violated the provisions of this chapter or any rule adopted under this chapter. Except for emergencies, prior to any suspension, the committee shall give written notice of its consideration of suspension and of its reasons therefor and shall provide an opportunity for a prompt hearing.
III. The committee may revoke any certificate that is suspended after the person holding the suspended certificate has been given at least 90 days' written notice of the committee's consideration of revocation and of its reasons therefor and has been provided an opportunity for a full hearing.
IV. Notwithstanding any other provision of this chapter, each of the other state agencies having permitting or other regulatory authority shall retain all of its powers and duties of enforcement.
V. The full amount of costs and expenses incurred by the committee in connection with any enforcement action against a person holding a certificate, including any action under this section and any action under RSA 162-H:19, in which the person is determined to have violated any provision of this chapter, any rule adopted by the committee, or any of the terms and conditions of the issued certificate, shall be assessed to the person and shall be paid by the person to the committee. Any amounts paid by a person to the committee pursuant to this paragraph shall be deposited in the site evaluation committee fund established in RSA 162-H:21.

Source. 1991, 295:1. 2009, 65:15, eff. Aug. 8, 2009. 2014, 217:17, 18, eff. July 1, 2014. 2015, 219:6, eff. July 8, 2015.

Section 162-H:13

162-H:13 Records. – Complete verbatim records shall be kept by the committee of all hearings, and records of all other actions, proceedings, and correspondence of the committee, including submittals of information and reports by members of the public, shall be maintained, all of which records shall be open to the public inspection and copying as provided for under RSA 91-A. Records regarding pending applications for a certificate shall also be made available on a website.

Source. 1991, 295:1, eff. Jan. 1, 1992. 2014, 217:19, eff. July 1, 2014.

Section 162-H:14

162-H:14 Temporary Suspension of Deliberations. –
I. If the site evaluation committee, at any time while an application for a certificate is before it, deems it to be in the public interest, it may temporarily suspend its deliberations and time frame established under RSA 162-H:7.
II. [Repealed.]

Source. 1991, 295:1. 2009, 65:16, 24, VIII, eff. Aug. 8, 2009. 2014, 217:19, eff. July 1, 2014.

Section 162-H:15

162-H:15 Informational Meetings. – [Repealed 2014, 217:28, IV, eff. July 1, 2014.]

Section 162-H:16

162-H:16 Findings and Certificate Issuance. –

I. The committee shall incorporate in any certificate such terms and conditions as may be specified to the committee by any of the state agencies having permitting or other regulatory authority, under state or federal law, to regulate any aspect of the construction or operation of the proposed facility; provided, however, the committee shall not issue any certificate under this chapter if any of the state agencies denies authorization for the proposed activity over which it has permitting or other regulatory authority. The denial of any such authorization shall be based on the record and explained in reasonable detail by the denying agency.

II. Any certificate issued by the site evaluation committee shall be based on the record. The decision to issue a certificate in its final form or to deny an application once it has been accepted shall be made by a majority of the full membership. A certificate shall be conclusive on all questions of siting, land use, air and water quality.

III. The committee may consult with interested regional agencies and agencies of border states in the consideration of certificates.

IV. After due consideration of all relevant information regarding the potential siting or routes of a proposed energy facility, including potential significant impacts and benefits, the site evaluation committee shall determine if issuance of a certificate will serve the objectives of this chapter. In order to issue a certificate, the committee shall find that:

(a) The applicant has adequate financial, technical, and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate.

(b) The site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies.

(c) The site and facility will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety.

(d) [Repealed.]

(e) Issuance of a certificate will serve the public interest.

V. [Repealed.]

VI. A certificate of site and facility may contain such reasonable terms and conditions, including but not limited to the authority to require bonding, as the committee deems necessary and may provide for such reasonable monitoring procedures as may be necessary. Such certificates, when issued, shall be final and subject only to judicial review.

VII. The committee may condition the certificate upon the results of required federal and state agency studies whose study period exceeds the application period.

Source. 1991, 295:1. 2009, 65:18-21, 24, IX, eff. Aug. 8, 2009. 2014, 217:20-22, eff. July 1, 2014. 2015, 264:2, eff. July 20, 2015.

Section 162-H:17

162-H:17 Bulk Power Facility Plans. – [Repealed 2009, 65:24, X, eff. Aug. 8, 2009.]

Section 162-H:18

162-H:18 Review; Hearing. – [Repealed 2009, 65:24, XI, eff. Aug. 8, 2009.]

Section 162-H:19

162-H:19 Penalties. –

I. The superior court, in term time or in vacation, may enjoin any act in violation of this chapter.

II. Any construction or operation of energy facilities in violation of this chapter, or in material violation of the

amount of compensation or reimbursement. The chairperson or administrator shall develop a recordkeeping system and accounting and payment procedures.
V. Funding for all compensation and reimbursement under this section shall be as provided in RSA 162-H:21.

Source. 2015, 219:5, eff. July 8, 2015.

Source. 1977, 540:2. 1986, 83:2. 1989, 274:1. 1995, 260:4. 2001, 223:1. 2008, 278:3, eff. July 1, 2008 at 12:01 a.m.; 303:3, eff. July 1, 2008; 303:8, eff. Sept. 5, 2008 at 12:01 a.m.; 354:1, eff. Sept. 5, 2008.

Section 91-A:2

91-A:2 Meetings Open to Public. –

I. For the purpose of this chapter, a "meeting" means the convening of a quorum of the membership of a public body, as defined in RSA 91-A:1-a, VI, or the majority of the members of such public body if the rules of that body define "quorum" as more than a majority of its members, whether in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate with each other contemporaneously, subject to the provisions set forth in RSA 91-A:2, III, for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power. A chance, social, or other encounter not convened for the purpose of discussing or acting upon such matters shall not constitute a meeting if no decisions are made regarding such matters. "Meeting" shall also not include:

(a) Strategy or negotiations with respect to collective bargaining;

(b) Consultation with legal counsel;

(c) A caucus consisting of elected members of a public body of the same political party who were elected on a partisan basis at a state general election or elected on a partisan basis by a town or city which has adopted a partisan ballot system pursuant to RSA 669:12 or RSA 44:2; or

(d) Circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting; provided, that nothing in this subparagraph shall be construed to alter or affect the application of any other section of RSA 91-A to such documents or related communications.

II. Subject to the provisions of RSA 91-A:3, all meetings, whether held in person, by means of telephone or electronic communication, or in any other manner, shall be open to the public. Except for town meetings, school district meetings, and elections, no vote while in open session may be taken by secret ballot. Any person shall be permitted to use recording devices, including, but not limited to, tape recorders, cameras, and videotape equipment, at such meetings. Minutes of all such meetings, including nonpublic sessions, shall include the names of members, persons appearing before the public bodies, and a brief description of the subject matter discussed and final decisions. Subject to the provisions of RSA 91-A:3, minutes shall be promptly recorded and open to public inspection not more than 5 business days after the meeting, except as provided in RSA 91-A:6, and shall be treated as permanent records of any public body, or any subordinate body thereof, without exception. Except in an emergency or when there is a meeting of a legislative committee, a notice of the time and place of each such meeting, including a nonpublic session, shall be posted in 2 appropriate places one of which may be the public body's Internet website, if such exists, or shall be printed in a newspaper of general circulation in the city or town at least 24 hours, excluding Sundays and legal holidays, prior to such meetings. An emergency shall mean a situation where immediate undelayed action is deemed to be imperative by the chairman or presiding officer of the public body, who shall post a notice of the time and place of such meeting as soon as practicable, and shall employ whatever further means are reasonably available to inform the public that a meeting is to be held. The minutes of the meeting shall clearly spell out the need for the emergency meeting. When a meeting of a legislative committee is held, publication made pursuant to the rules of the house of representatives or the senate, whichever rules are appropriate, shall be sufficient notice. If the charter of any city or town or guidelines or rules of order of any public body require a broader public access to official meetings and records than herein described, such charter provisions or guidelines or rules of order shall take precedence over the requirements of this chapter. For the purposes of this paragraph, a business day means the hours of 8 a.m. to 5 p.m. on Monday through Friday, excluding national and state holidays.

II-a. If a member of the public body believes that any discussion in a meeting of the body, including in a nonpublic session, violates this chapter, the member may object to the discussion. If the public body continues the discussion despite the objection, the objecting member may request that his or her objection be recorded in the minutes and may then continue to participate in the discussion without being subject to the penalties of RSA 91-A:8, IV or V. Upon such a request, the public body shall record the member's objection in its minutes of the meeting. If the objection is to a discussion in nonpublic session, the objection shall also be recorded in the public minutes, but the notation in the public minutes shall include only the member's name, a statement that he or she objected to the discussion in nonpublic session, and a reference to the provision of RSA 91-A:3, II, that was the

basis for the discussion.
II-b. (a) If a public body maintains an Internet website or contracts with a third party to maintain an Internet website on its behalf, it shall either post its approved minutes in a consistent and reasonably accessible location on the website or post and maintain a notice on the website stating where the minutes may be reviewed and copies requested.
(b) If a public body chooses to post meeting notices on the body's Internet website, it shall do so in a consistent and reasonably accessible location on the website. If it does not post notices on the website, it shall post and maintain a notice on the website stating where meeting notices are posted.
III. A public body may, but is not required to, allow one or more members of the body to participate in a meeting by electronic or other means of communication for the benefit of the public and the governing body, subject to the provisions of this paragraph.
(a) A member of the public body may participate in a meeting other than by attendance in person at the location of the meeting only when such attendance is not reasonably practical. Any reason that such attendance is not reasonably practical shall be stated in the minutes of the meeting.
(b) Except in an emergency, a quorum of the public body shall be physically present at the location specified in the meeting notice as the location of the meeting. For purposes of this subparagraph, an "emergency" means that immediate action is imperative and the physical presence of a quorum is not reasonably practical within the period of time requiring action. The determination that an emergency exists shall be made by the chairman or presiding officer of the public body, and the facts upon which that determination is based shall be included in the minutes of the meeting.
(c) Each part of a meeting required to be open to the public shall be audible or otherwise discernable to the public at the location specified in the meeting notice as the location of the meeting. Each member participating electronically or otherwise must be able to simultaneously hear each other and speak to each other during the meeting, and shall be audible or otherwise discernable to the public in attendance at the meeting's location. Any member participating in such fashion shall identify the persons present in the location from which the member is participating. No meeting shall be conducted by electronic mail or any other form of communication that does not permit the public to hear, read, or otherwise discern meeting discussion contemporaneously at the meeting location specified in the meeting notice.
(d) Any meeting held pursuant to the terms of this paragraph shall comply with all of the requirements of this chapter relating to public meetings, and shall not circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1.
(e) A member participating in a meeting by the means described in this paragraph is deemed to be present at the meeting for purposes of voting. All votes taken during such a meeting shall be by roll call vote.

Source. 1967, 251:1. 1969, 482:1. 1971, 327:2. 1975, 383:1. 1977, 540:3. 1983, 279:1. 1986, 83:3. 1991, 217:2. 2003, 287:7. 2007, 59:2. 2008, 278:2, eff. July 1, 2008 at 12:01 a.m.; 303:4, eff. July 1, 2008. 2016, 29:1, eff. Jan. 1, 2017. 2017, 165:1, eff. Jan. 1, 2018; 234:1, eff. Jan. 1, 2018.

Section 91-A:2-b

91-A:2-b Meetings of the Economic Strategic Commission to Study the Relationship Between New Hampshire Businesses and State Government by Open Blogging Permitted. – [Repealed 2012, 232:14, eff.

TITLE LV
PROCEEDINGS IN SPECIAL CASES

CHAPTER 541-A
ADMINISTRATIVE PROCEDURE ACT

Section 541-A:22

541-A:22 Validity of Rules. –

I. No agency rule is valid or effective against any person or party, nor may it be enforced by the state for any purpose, until it has been filed as required in this chapter and has not expired.

II. Rules shall be valid and binding on persons they affect, and shall have the force of law unless they have expired or have been amended or revised or unless a court of competent jurisdiction determines otherwise. Except as provided by RSA 541-A:13, VI, rules shall be prima facie evidence of the proper interpretation of the matter that they refer to.

III. An agency shall not by rule:

(a) Provide for penalties or fines unless specifically authorized by statute.

(b) Require licensing, as defined in RSA 541-A:1, IX, unless authorized by a law which uses one of the specific terms listed in RSA 541-A:1, VIII.

(c) Require fees unless specifically authorized by a statute enforced or administered by an agency. Specific authorization shall not include the designation of agency fee income in the operating budget when no other statutory authorization exists.

(d) Provide for non-consensual inspections of private property, unless the statute enforced or administered by the agency specifically grants inspection authority.

(e) Delegate its rulemaking authority to anyone other than the agency named in the statute delegating authority.

(f) Adopt rules under another agency's authority.

(g) Expand or limit a statutory definition affecting the scope of who may practice a profession.

(h) Require a submission of a social security number unless mandated by state or federal law.

IV. No agency shall grant waivers of, or variances from, any provisions of its rules without either amending the rules, or providing by rule for a waiver or variance procedure. The duration of the waiver or variance may be temporary if the rule so provides.

Source. 1994, 412:1. 2003, 309:2, eff. July 1, 2004. 2015, 234:8, eff. Sept. 11, 2015.

TITLE LV
PROCEEDINGS IN SPECIAL CASES

CHAPTER 541-A
ADMINISTRATIVE PROCEDURE ACT

Section 541-A:35

541-A:35 Decisions and Orders. – A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. Parties shall be notified either personally or by mail of any decision or order. Upon request, a copy of the decision or order shall be delivered or mailed promptly to each party and to a party's recognized representative.

Source. 1994, 412:1. 2000, 288:21, eff. July 1, 2000.

Site 202.19 Burden and Standard of Proof.

(a) The party asserting a proposition shall bear the burden of proving the proposition by a preponderance of the evidence.

(b) An applicant for a certificate of site and facility shall bear the burden of proving facts sufficient for the committee or subcommittee, as applicable, to make the findings required by RSA 162-H:16.

(c) In a hearing held to determine whether a certificate, license, permit or other approval that has already been issued should be suspended, revoked or not renewed, the committee or subcommittee, as applicable, shall make its decision based on a preponderance of the evidence in the record.

Source. *#9183-A, eff 6-17-08; ss by #10993, eff 12-16-15*

Site 202.28 Issuance or Denial of Certificate.

(a) The committee or subcommittee, as applicable, shall make a finding regarding the criteria stated in RSA 162-H:16, IV, and Site 301.13 through 301.17, and issue an order pursuant to RSA 541-A:35 issuing or denying a certificate.

(b) The committee shall keep a written decision or order and all filings related to an application on file in its public records for not less than 5 years following the date of the final decision or order or the date of the decision on any appeal, unless the director of the division of records management and archives of the department of state sets a different retention period pursuant to a uniform procedures manual adopted under RSA 5:40.

Source. *#9183-A, eff 6-17-08; ss by #10993, eff 12-16-15*

CHAPTER Site 300 CERTIFICATES OF SITE AND FACILITY

PART Site 301 REQUIREMENTS FOR APPLICATIONS FOR CERTIFICATES

Site 301.01 Filing.

(a) Each applicant for a certificate for an energy facility shall file with the committee one original and 15 paper copies of its application and an electronic version of its application in PDF format, unless otherwise directed by the chairperson or the administrator, after consultation by the chairperson or administrator with state agencies that are required to be provided a copy of the application under this chapter, in order to permit the timely and efficient review and adjudication of the application.

(b) The committee or the administrator shall:

(1) Acknowledge receipt of an application filed under Site 301.01(a) in writing directed to the applicant;

(2) Forward a copy of the application and acknowledgment to each member of the committee;

(3) Forward a copy of the application to each state agency required to receive a copy under Site 301.10(a) and (b); and

(4) Post a copy of each application on the committee's website.

Source. #9183-B, eff 6-17-08; ss by #10994, eff 12-16-15

Site 301.02 Format of Application.

(a) Paper copies of applications shall be prepared on standard 8 ½ x 11 inch sheets, and plans, maps, photosimulations, and other oversized documents shall be folded to that size or rolled and provided in protective tubes. Electronic copies of applications shall be submitted through electronic mail, on compact discs, or in an electronic file format compatible with the computer system of the commission.

(b) Each application shall contain a table of contents.

(c) All information furnished shall appear in the same order as the requirements to provide that information appear in Site 301.03 through 301.09.

(d) If any numbered item is not applicable or the information is not available, an appropriate comment shall be made so that no numbered item shall remain unanswered.

(e) To the extent practicable, copies of applications shall be double-sided.

Source. #9183-B, eff 6-17-08; ss by #10994, eff 12-16-15

Site 301.03 Contents of Application.

(a) Each application for a certificate of site and facility for an energy facility shall be signed and sworn to by the person, or by an authorized executive officer of the corporation, company, association, or other organization making such application.

(b) Each application shall include the information contained in this paragraph,and in (c) through (h) below, as follows:

(1) The name of the applicant;

(2) The applicant's mailing address, telephone and fax numbers, and e-mail address;

(3) The name and address of the applicant's parent company, association, or corporation, if the applicant is a subsidiary;

(4) If the applicant is a corporation:

a. The state of incorporation;

b. The corporation's principal place of business; and

c. The names and addresses of the corporation's directors, officers, and stockholders;

(5) If the applicant is a limited liability company:

a. The state of the company's organization;

b. The company's principal place of business; and

c. The names and addresses of the company's members, managers, and officers;

(6) If the applicant is an association, the names and addresses of the residences of the members of the association; and

(7) Whether the applicant is or will be the owner or lessee of the proposed facility or has or will have some other legal or business relationship to the proposed facility, including a description of that relationship.

(c) Each application shall contain the following information with respect to the site of the proposed energy facility and alternative locations the applicant considers available for the proposed facility:

(1) The location and address of the site of the proposed facility;

(2) Site acreage, shown on an attached property map and located by scale on a U.S. Geological Survey or GIS map;

(3) The location, shown on a map, of property lines, residences, industrial buildings, and other structures and improvements within the site, on abutting property with respect to the site, and within 100 feet of the site if such distance extends beyond the boundary of any abutting property;

(4) Identification of wetlands and surface waters of the state within the site, on abutting property with respect to the site, and within 100 feet of the site if such distance extends beyond the boundary of any abutting property, except if and to the extent such identification is not possible due to lack of access to the relevant property and lack of other sources of the information to be identified;

(5) Identification of natural, historic, cultural, and other resources at or within the site, on abutting property with respect to the site, and within 100 feet of the site if such distance extends beyond the boundary of any abutting property, except if and to the extent such identification is not possible due to lack of access to the relevant property and lack of other sources of the information to be identified;

(6) Evidence that the applicant has a current right, an option, or other legal basis to acquire the right, to construct, operate, and maintain the facility on, over, or under the site, in the form of:

a. Ownership, ground lease, easement, or other contractual right or interest;

b. A license, permit, easement, or other permission from a federal, state, or local government agency, or an application for such a license, permit, easement, or other permission from a state governmental agency that is included with the application; or

c. The simultaneous filing of a federal regulatory proceeding or taking of other action that would, if successful, provide the applicant with a right of eminent domain to acquire control of the site for the purpose of constructing, operating, and maintaining the facility thereon; and

(7) Evidence that the applicant has a current or conditional right of access to private property within the boundaries of the proposed energy facility site sufficient to accommodate a site visit by the committee, which private property, with respect to energy transmission pipelines under the jurisdiction of the Federal Energy Regulatory Commission, may be limited to the proposed locations of all above-ground structures and a representative sample of the proposed locations of underground structures or facilities.

(d) Each application shall include information about other required applications and permits as follows:

(1) Identification of all other federal and state government agencies having permitting or other regulatory authority, under federal or state law, to regulate any aspect of the construction or operation of the proposed energy facility;

(2) Documentation that demonstrates compliance with the application requirements of all such agencies;

(3) A copy of the completed application form for each such agency; and

(4) Identification of any requests for waivers from the information requirements of any state agency or department having permitting or other regulatory authority whether or not such agency or department is represented on the committee.

(e) If the application is for an energy facility, including an energy transmission pipeline, that is not an electric generating facility or an electric transmission line, the application shall include:

(1) The type of facility being proposed;

(2) A description of the process to extract, produce, manufacture, transport or refine the source of energy;

(3) The facility's size and configuration;

(4) The ability to increase the capacity of the facility in the future;

(5) Raw materials used or transported, as follows:

a. An inventory, including amounts and specifications;

b. A plan for procurement, describing sources and availability; and

c. A description of the means of transportation;

(6) Production information, as follows:

a. An inventory of products and waste streams, including blowdownemissions from a high pressure gas pipeline;

b. The quantities and specifications of hazardous materials; and

c. Waste management plans;

(7) A map showing the entire energy facility, including, in the case of an energy transmission pipeline, the location of each compressor station, pumping station, storage facility, and other ancillary facilities associated with the energy facility, and the corridor width and length in the case of a proposed new route or widening along an existing route; and

(8) For a high pressure gas pipeline, the following information:

a. Construction information, including a description of the pipe to be used, depth of pipeline placement, type of fuel to be used to power any associated compressor station, and a description of any compressor station emergency shutdown system;

b. Proposed construction schedule, including start date and scheduled completion date;

c. Operation and maintenance information, including a description of measures to be taken to notify adjacent landowners and minimize sound during blowdown events;

d. Copy of any proposed plan application or other documentation required to be submitted to the Federal Energy Regulatory Commission in connection with construction and operation of the proposed facility; and

e. Copy of any environmental report, assessment or impact statement prepared by or on behalf of the Federal Energy Regulatory Commission when it becomes available.

(f) If the application is for an electric generating facility, the application shall include the following information:

(1) Make, model, and manufacturer of each turbine and generator unit;

(2) Capacity in megawatts, as designed and as intended for operation;

(3) Type of turbine and generator unit, including:

a. Fuel utilized;

b. Method of cooling condenser discharge; and

c. Unit efficiency;

(4) Any associated new substations, generator interconnection lines, and electric transmission lines, whether identified by the applicant or through a system impact study conducted by or on behalf of the interconnecting utility or ISO New England, Inc.;

(5) Copy of system impact study report for interconnection of the facility as prepared by or on behalf of ISO New England, Inc. or the interconnecting utility, if available at the time of application;

(6) Construction schedule, including start date and scheduled completion date; and

(7) Description of anticipated mode and frequency of operation of the facility.

(g) If the application is for an electric transmission line or an electric generating facility with an associated electric transmission or distribution line, the application shall include the following information:

(1) Location shown on U.S. Geological Survey Map;

(2) A map showing the entire electric transmission or distribution line project, including the height and location of each pole or tower, the distance between each pole or tower, and the location of each substation, switchyard, converter station, and other ancillary facilities associated with the project;

(3) Corridor width for:

a. New route; or

b. Widening along existing route;

(4) Length of line;

(5) Distance along new route;

(6) Distance along existing route;

(7) Voltage design rating;

(8) Any associated new electric generating unit or units;

(9) Type of construction described in detail;

(10) Construction schedule, including start date and scheduled completion date;

(11) Copy of any proposed plan application or other system study request documentation required to be submitted to ISO New England, Inc. in connection with construction and operation of the proposed facility; and

(12) Copy of system impact study report for the proposed electric transmission facility as prepared by or on behalf of ISO New England, Inc. or the interconnecting utility, if available at the time of application.

(h) Each application for a certificate for an energy facility shall include the following:

(1) A detailed description of the type and size of each major part of the proposed facility;

(2) Identification of the applicant's preferred choice and other alternatives it considers available for the site and configuration of each major part of the proposed facility and the reasons for the preferred choice;

(3) Documentation that the applicant has held at least one public information session in each county where the proposed facility is to be located at least 30 days prior to filing its application, pursuant to RSA 162-H:10, I and Site 201.01;

(4) Documentation that written notification of the proposed facility, including copies of the application, has been given to the governing body of each municipality in which the facility is proposed to be located, and that

written notification of the application filing, including information regarding means to obtain an electronic or paper version of the application, has been sent by first class mail to the governing body of each of the other affected communities;

(5) The information described in Sections 301.04 through 301.09;

(6) For a proposed wind energy facility, information regarding the cumulative impacts of the proposed facility on natural, wildlife, habitat, scenic, recreational, historic, and cultural resources, including, with respect to aesthetics, the potential impacts of combined observation, successive observation, and sequential observation of wind energy facilities by the viewer;

(7) Information describing how the proposed facility will be consistent with the public interest, including the specific criteria set forth in Site 301.16(a)-(j); and

(8) Pre-filed testimony and exhibits supporting the application.

Source. #9183-B, eff 6-17-08; ss by #10994, eff 12-16-15; amd by #11156, eff 8-16-16

Site 301.04 Financial, Technical and Managerial Capability. Each application shall include a detailed description of the applicant's financial, technical, and managerial capability to construct and operate the proposed energy facility, as follows:

(a) Financial information shall include:

(1) A description of the applicant's experience financing other energy facilities;

(2) A description of the corporate structure of the applicant, including a chart showing the direct and indirect ownership of the applicant;

(3) A description of the applicant's financing plan for the proposed facility, including the amounts and sources of funds required for the construction and operation of the proposed facility;

(4) An explanation of how the applicant's financing plan compares with financing plans employed by the applicant or its affiliates, or, if no such plans have been employed by the applicant or its affiliates, then by unaffiliated project developers if and to the extent such information is publicly available, for energy facilities that are similar in size and type to the proposed facility, including any increased risks or costs associated with the applicant's financing plan; and

(5) Current and pro forma statements of assets and liabilities of the applicant;

(b) Technical information shall include:

(1) A description of the applicant's qualifications and experience in constructing and operating energy facilities, including projects similar to the proposed facility; and

(2) A description of the experience and qualifications of any contractors or consultants engaged or to be engaged by the applicant to provide technical support for the construction and operation of the proposed facility, if known at the time of application;

(c) Managerial information shall include:

(1) A description of the applicant's management structure for the construction and operation of the proposed facility, including an organizational chart for the applicant;

(2) A description of the qualifications of the applicant and its executive personnel to manage the construction and operation of the proposed facility; and

(3) To the extent the applicant plans to rely on contractors or consultants for the construction and operation of the proposed facility, a description of the experience and qualifications of the contractors and consultants, if

known at the time of application.

Source. #9183-B, eff 6-17-08; ss by #10994, eff 12-16-15

Site 301.05 Effects on Aesthetics.

(a) Each application shall include a visual impact assessment of the proposed energy facility, prepared in a manner consistent with generally accepted professional standards by a professional trained or having experience in visual impact assessment procedures, regarding the effects of, and plans for avoiding, minimizing, or mitigating potential adverse effects of, the proposed facility on aesthetics.

(b) The visual impact assessment shall contain the following components:

(1) A description and map depicting the locations of the proposed facility and all associated buildings, structures, roads, and other ancillary components, and all areas to be cleared and graded, that would be visible from any scenic resources, based on both bare ground conditions using topographic screening only and with consideration of screening by vegetation or other factors;

(2) A description of how the applicant identified and evaluated the scenic quality of the landscape and potential visual impacts;

(3) A narrative and graphic description, including maps and photographs, of the physiographic, historical and cultural features of the landscape surrounding the proposed facility to provide the context for evaluating any visual impacts;

(4) A computer-based visibility analysis to determine the area of potential visual impact, which, for proposed:

a. Wind energy systems shall extend to a minimum of a 10-mile radius from each wind turbine in the proposed facility;

b. Electric transmission lines longer than 1 mile shall extend to a ½ mile radius if located within any urbanized area;

c. Electric transmission lines longer than 1 mile shall extend to a 2 mile radius if located within any urban cluster;

d. Electric transmission lines longer than 1 mile if located within any rural area shall extend to:

1. A radius of 3 miles if the line would be located within an existing transmission corridor and neither the width of the corridor nor the height of any towers, poles, or other supporting structures would be increased; or

2. A radius of 10 miles if the line would be located in a new transmission corridor or in an existing transmission corridor if either or both the width of the corridor or the height of the towers, poles, or other supporting structures would be increased;

(5) An identification of all scenic resources within the area of potential visual impact and a description of those scenic resources from which the proposed facility would be visible;

(6) A characterization of the potential visual impacts of the proposed facility, and of any visible plume that would emanate from the proposed facility, on identified scenic resources as high, medium, or low, based on consideration of the following factors:

a. The expectations of the typical viewer;

b. The effect on future use and enjoyment of the scenic resource;

c. The extent of the proposed facility, including all structures and disturbed areas, visible from the scenic resource;

d. The distance of the proposed facility from the scenic resource;

e. The horizontal breadth or visual arc of the visible elements of the proposed facility;

f. The scale, elevation, and nature of the proposed facility relative to surrounding topography and existing structures;

g. The duration and direction of the typical view of elements of the proposed facility; and

h. The presence of intervening topography between the scenic resource and elements of the proposed facility;

(7) Photosimulations from representative key observation points, from other scenic resources for which the potential visual impacts are characterized as "high" pursuant to (6) above, and, to the extent feasible, from a sample of private property observation points within the area of potential visual impact, to illustrate the potential change in the landscape that would result from construction of the proposed facility and associated infrastructure, including land clearing and grading and road construction, and from any visible plume that would emanate from the proposed facility;

(8) Photosimulations shall meet the following additional requirements:

a. Photographs used in the simulation shall be taken at high resolution and contrast, using a full frame digital camera with a 50 millimeter fixed focal length lens or digital equivalent that creates an angle of view that closely matches human visual perception, under clear weather conditions and at a time of day that provides optimal clarity and contrast, and shall avoid if feasible showing any utility poles, fences, walls, trees, shrubs, foliage, and other foreground objects and obstructions;

b. Photosimulations shall be printed at high resolution at 15.3 inches by10.2 inches, or 390 millimeters by 260 millimeters;

c. At least one set of photosimulations shall represent winter season conditions without the presence of foliage typical of other seasons;

d. Field conditions in which a viewpoint is photographed shall be recorded including:

1. Global Position System (GPS) location points with an accuracy of at least 3 meters for each simulation viewpoint to ensure repeatability;

2. Camera make and model and lens focal length;

3. All camera settings at the time the photograph is taken; and

4. Date, time and weather conditions at the time the photograph is taken; and

e. When simulating the presence of proposed wind turbines, the following shall apply:

1. Turbines shall be placed with full frontal views and no haze or fog effect applied;

2. Turbines shall reasonably represent the shape of the intended turbines for a project including the correct hub height and rotor diameter;

3. Turbine blades shall be set at random angles with some turbines showing a blade in the 12 o'clock position; and

4. The lighting model used to render wind turbine elements shall correspond to the lighting visible in the base photograph;

(9) If the proposed facility is required by Federal Aviation Administration regulations to install aircraft warning lighting or if the proposed facility would include other nighttime lighting, a description and characterization of the potential visual impacts of this lighting, including the number of lights visible and their distance from key observation points; and

(10) A description of the measures planned to avoid, minimize, or mitigate potential adverse effects of the proposed facility, and of any visible plume that would emanate from the proposed facility, and the alternative measures considered but rejected by the applicant.

Source. #9183-B, eff 6-17-08; ss by #10994, eff 12-16-15

Site 301.06 Effects on Historic Sites. Each application shall include the following information regarding the identification of historic sites and plans for avoiding, minimizing, or mitigating potential adverse effects of, the proposed energy facility on historic sites:

(a) Demonstration that project review of the proposed facility has been initiated for purposes of compliance with Section 106 of the National Historic Preservation Act, 54 U.S.C. §306108, or RSA 227-C:9, as applicable;

(b) Identification of all historic sites and areas of potential archaeological sensitivity located within the area of potential effects, as defined in 36 C.F.R. §800.16(d), available as noted in Appendix B;

(c) Finding or determination by the division of historical resources of the department of cultural resources and, if applicable, the lead federal agency, that no historic properties would be affected, that there would be no adverse effects, or that there would be adverse effects to historic properties, if such a finding or determination has been made prior to the time of application;

(d) Description of the measures planned to avoid, minimize, or mitigate potential adverse effects on historic sites and archaeological resources, and the alternative measures considered but rejected by the applicant; and

(e) Description of the status of the applicant's consultations with the division of historical resources of the department of cultural resources, and, if applicable, with the lead federal agency, and, to the extent known to the applicant, any consulting parties, as defined in 36 C.F.R. §800.2(c), available as noted in Appendix B.

Source. #10994, eff 12-16-15

Site 301.07 Effects on Environment. Each application shall include the following information regarding the effects of, and plans for avoiding, minimizing, or mitigating potential adverse effects of, the proposed energy facility on air quality, water quality, and the natural environment:

(a) Information including the applications and permits filed pursuant to Site 301.03(d) regarding issues of air quality;

(b) Information including the applications and permits filed pursuant to Site 301.03(d) regarding issues of water quality;

(c) Information regarding the natural environment, including the following:

(1) Description of how the applicant identified significant wildlife species, rare plants, rare natural communities, and other exemplary natural communities potentially affected by construction and operation of the proposed facility, including communications with and documentation received from the New Hampshire department of fish and game, the New Hampshire natural heritage bureau, the United States Fish and Wildlife Service, and any other federal or state agencies having permitting or other regulatory authority over fish, wildlife, and other natural resources;

(2) Identification of significant wildlife species, rare plants, rare natural communities, and other exemplary natural communities potentially affected by construction and operation of the proposed facility;

(3) Identification of critical wildlife habitat and significant habitat resources potentially affected by construction and operation of the proposed facility;

(4) Assessment of potential impacts of construction and operation of the proposed facility on significant wildlife species, rare plants, rare natural communities, and other exemplary natural communities, and on critical wildlife habitat and significant habitat resources, including fragmentation or other alteration of terrestrial or aquatic significant habitat resources;

(5) Description of the measures planned to avoid, minimize, or mitigate potential adverse impacts of construction and operation of the proposed facility on wildlife species, rare plants, rare natural communities, and other exemplary natural communities, and on critical wildlife habitat and significant habitat resources, and the alternative measures considered but rejected by the applicant; and

(6) Description of the status of the applicant's discussions with the New Hampshire department of fish and game, the New Hampshire natural heritage bureau, the United States Fish and Wildlife Service, and any other federal or state agencies having permitting or other regulatory authority over fish, wildlife, and other natural resources.

Source. #10994, eff 12-16-15

Site 301.08 Effects on Public Health and Safety. Each application shall include the following information regarding the effects of, and plans for avoiding, minimizing, or mitigating potential adverse effects of, the proposed energy facility on public health and safety:

(a) For proposed wind energy systems:

(1) A sound impact assessment prepared in accordance with professional standards by an expert in the field, which assessment shall include the reports of a preconstruction sound background study and a sound modeling study, as specified in Site 301.18;

(2) An assessment that identifies the astronomical maximum as well as the anticipated hours per year of shadow flicker expected to be perceived at each residence, learning space, workplace, health care setting, outdoor or indoor public gathering area, other occupied building, and roadway, within a minimum of 1 mile of any turbine, based on shadow flicker modeling that assumes an impact distance of at least 1 mile from each of the turbines;

(3) Description of planned setbacks that indicate the distance between each wind turbine and the nearest landowner's existing building and property line, and between each wind turbine and the nearest public road and overhead or underground energy infrastructure or energy transmission pipeline within 2 miles of such wind turbine, and explain why the indicated distances are adequate to protect the public from risks associated with the operation of the proposed wind energy facility;

(4) An assessment of the risks of ice throw, blade shear, and tower collapse on public safety, including a description of the measures taken or planned to avoid or minimize the occurrence of such events, if necessary, and the alternative measures considered but rejected by the applicant;

(5) Description of the lightning protection system planned for the proposed facility;

(6) Description of any determination made by the Federal Aviation Administration regarding whether any hazard to aviation is expected from any of the wind turbines included in the proposed facility, and describe the Federal Aviation Administration's lighting, turbine color, and other requirements for the wind turbines;

(7) A decommissioning plan prepared by an independent, qualified person with demonstrated knowledge and experience in wind generation projects and cost estimates, which plan shall provide for removal of all structures and restoration of the facility site;

(8) The decommissioning plan required under (7) above shall include each of the following:

a. A description of sufficient and secure funding to implement the plan, which shall not account for the anticipated salvage value of facility components or materials;

b. The provision of financial assurance in the form of an irrevocable standby letter of credit, performance bond, surety bond, or unconditional payment guaranty executed by a parent company of the facility owner maintaining at all times an investment grade credit rating;

c. All turbines, including the blades, nacelles and towers, shall be disassembled and transported off-site;

d. All transformers shall be transported off-site;

e. The overhead power collection conductors and the power poles shall be removed from the site;

f. All underground infrastructure at depths less than four feet below grade shall be removed from the site and all underground infrastructure at depths greater than four feet below finished grade shall be abandoned in place; and

g. Areas where subsurface components are removed shall be filled, graded to match adjacent contours, reseeded, stabilized with an appropriate seed and allowed to re-vegetate naturally;

(9) A plan for fire protection for the proposed facility prepared by or in consultation with a fire safety expert; and

(10) An assessment of the risks that the proposed facility will interfere with the weather radars used for severe storm warning or any local weather radars.

(b) For electric transmission facilities, an assessment of electric and magnetic fields generated by the proposed facility and the potential impacts of such fields on public health and safety, based on established scientific knowledge, and an assessment of the risks of collapse of the towers, poles, or other supporting structures, and the potential adverse effects of any such collapse.

(c) For high pressure gas pipelines:

(1) A comprehensive health impact assessment prepared by an independent health and safety expert in accordance with nationally recognized standards, and specifically designed to identify and evaluate potential short-term and long-term human health impacts by identifying potential pathways for facility-related contaminants to harm human health, quantifying the cumulative risks posed by any contaminants, and recommending necessary avoidance, minimization, or mitigation;

(2) A sound and vibration impact assessment prepared by an independent expert in the field, in accordance with ANSI/ASA S12.9-2013 Part 3 for short-term monitoring and with ANSI S12.9-1992 2013 Part 2 for long-term monitoring, including the reports of a preconstruction sound and vibration background study and a sound and vibration modeling study;

(3) A description of planned setbacks that indicate the distance between:

a. The proposed high pressure gas pipeline and existing buildings on, and the boundaries of, abutting properties;

b. Any associated compressor station and schools, day-care centers, health care facilities, residences, residential neighborhoods, places of worship, elderly care facilities, and farms within a one mile radius;and

c. The proposed high pressure gas pipeline and any overhead or underground electric transmission line within 1/2 mile;

(4) An explanation of why the setbacks described by the applicant in response to (3), above, are adequate to protect the public from risks associated with the operation of the high pressure gas pipeline; and

(5) A description of all permanently installed exterior lighting at compressor stations and how it complies with Site 301.14(f)(5)c.

(d) For all energy facilities:

(1) Except as otherwise provided in (a)(1) above, an assessment of operational sound associated with the proposed facility, if the facility would involve use of equipment that might reasonably be expected to increase sound by 10 decibel A-weighted (dBA) or more over background levels, measured at the L-90 sound level, at the property boundary of the proposed facility site or, in the case of an electric transmission line or an energy transmission pipeline, at the edge of the right-of-way or the edge of the property boundary if the proposed facility, or portion thereof, will be located on land owned, leased or otherwise controlled by the applicant or an affiliate of the applicant;

(2) A facility decommissioning plan prepared by an independent, qualified person with demonstrated knowledge and experience in similar energy facility projects and cost estimates; the decommissioning plan shall include each of the following:

a. A description of sufficient and secure funding to implement the plan, which shall not account for the anticipated salvage value of facility components or materials;

b. The provision of financial assurance in the form of an irrevocable standby letter of credit, performance bond, surety bond, or unconditional payment guaranty executed by a parent company of the facility owner maintaining at all times an investment grade credit rating;

c. All transformers shall be transported off-site; and

d. All underground infrastructure at depths less than four feet below grade shall be removed from the site and all underground infrastructure at depths greater than four feet below finished grade shall be abandoned in place;

(3) A plan for fire safety prepared by or in consultation with a fire safety expert;

(4) A plan for emergency response to the proposed facility site; and

(5) A description of any additional measures taken or planned to avoid, minimize, or mitigate public health and safety impacts that would result from the construction and operation of the proposed facility, and the alternative measures considered but rejected by the applicant.

Source. #10994, eff 12-16-15; amd by #11156, eff 8-16-16

Site 301.09 Effects on Orderly Development of Region. Each application shall include information regarding the effects of the proposed energy facility on the orderly development of the region, including the views of municipal and regional planning commissions and municipal governing bodies regarding the proposed facility, if such views have been expressed in writing, and master plans of the affected communities and zoning ordinances of the proposed facility host municipalities and unincorporated places, and the applicant's estimate of the effects of the construction and operation of the facility on:

(a) Land use in the region, including the following:

(1) A description of the prevailing land uses in the affected communities; and

(2) A description of how the proposed facility is consistent with such land uses and identification of how the proposed facility is inconsistent with such land uses;

(b) The economy of the region, including an assessment of:

(1) The economic effect of the facility on the affected communities;

(2) The economic effect of the proposed facility on in-state economic activity during construction and operation periods;

(3) The effect of the proposed facility on State tax revenues and the tax revenues of the host and regional communities;

(4) The effect of the proposed facility on real estate values in the affected communities;

(5) The effect of the proposed facility on tourism and recreation; and

(6) The effect of the proposed facility on community services and infrastructure;

(c) Employment in the region, including an assessment of:

(1) The number and types of full-time equivalent local jobs expected to be created, preserved, or otherwise affected by the construction of the proposed facility, including direct construction employment and indirect employment induced by facility-related wages and expenditures; and

(2) The number and types of full-time equivalent jobs expected to be created, preserved, or otherwise affected by the operation of the proposed facility, including direct employment by the applicant and indirect employment induced by facility-related wages and expenditures.

Source. #10994, eff 12-16-15

Site 301.10 Completeness Review and Acceptance of Applications for Energy Facilities.

(a) Upon the filing of an application for an energy facility, the committee shall forward to each of the other state agencies having permitting or other regulatory authority, under state or federal law, to regulate any aspect of the construction or operation of the proposed facility, a copy of the application for the agency's review as described in RSA 162-H:7, IV.

(b) The committee also shall forward a copy of the application to the department of fish and game, the department of health and human services, the division of historical resources of the department of cultural resources, the natural

heritage bureau, the governor's office of energy and planning, and the division of fire safety of the department of safety, unless any such agency or office has been forwarded a copy of the application under (a) above.

(c) Upon receiving an application, the committee shall conduct a preliminary review to ascertain if the application contains sufficient information for the committee to review the application under RSA 162-H and these rules.

(d) Each state agency having permitting or other regulatory authority shall have 45 days from the time the committee forwards the application to notify the committee in writing whether the application contains sufficient information for its purposes.

(e) Within 60 days after the filing of the application, the committee shall determine whether the application is administratively complete and has been accepted for review.

(f) If the committee determines that an application is administratively incomplete, it shall notify the applicant in writing, specifying each of the areas in which the application has been deemed incomplete.

(g) If the applicant is notified that its application is administratively incomplete, the applicant may file a new and more complete application or complete the filed application by curing the specified defects within 10 days of the applicant's receipt of notification of incompleteness.

(h) If, within the 10-day time frame, the applicant files a new and more complete application or completes the filed application, in either case curing the defects specified in the notification of incompleteness, the committee shall, no later than 14 days after receipt of the new or completed application, accept the new or completed application.

(i) If the new application is not complete or the specified defects in the filed application remain uncured, the committee shall notify the applicant in writing of its rejection of the application and instruct the applicant to file a new application.

Source. #10994, eff 12-16-15

Site 301.11 Exemption Determination.

(a) Within 60 days of acceptance of an application or the filing of a petition for exemption, the committee shall exempt the applicant from the approval and certificate provisions of RSA 162-H and these rules, if the committee finds that:

(1) Existing state or federal statutes, state or federal agency rules or municipal ordinances provide adequate protection of the objectives set forth in RSA 162-H:1;

(2) Consideration of the proposed energy facility by only selected agencies represented on the committee is required and the objectives of RSA 162-H:1can be met by those agencies without exercising the provisions of RSA 162-H;

(3) Response to the application or request for exemption from the general public, provided through written submissions or in the adjudicative proceeding provided for in (b) below, indicates that the objectives of RSA 162-H:1 are met through the individual review processes of the participating agencies; and

(4) All environmental impacts or effects are adequately regulated by other federal, state, or local statutes, rules, or ordinances.

(b) The committee shall make the determination described in (a) above after conducting an adjudicative proceeding that includes a public hearing held in a county where the energy facility is proposed to be located.

Source. #10994, eff 12-16-15

Site 301.12 Timeframe for Application Review.

(a) Pursuant to RSA 162-H:7, VI-b, each state agency having permitting or other regulatory authority over the proposed energy facility shall report its progress to the committee within 150 days after application acceptance, outlining draft permit conditions and specifying additional data requirements necessary to make a final decision on the parts of the application that relate to its permitting or other regulatory authority.

(b) Pursuant to RSA 162-H:7, VI-c, each state agency having permitting or other regulatory authority over the proposed energy facility shall make and submit to the committee a final decision on the parts of the application that relate

to its permitting and other regulatory authority, no later than 240 days after application acceptance.

(c) Pursuant to RSA 162-H:7, VI-d, the committee shall issue or deny a certificate for an energy facility within 365 days after application acceptance.

(d) Pursuant to RSA 162-H:14, I, the committee shall temporarily suspend its deliberations and the time frames set forth in this section at any time while an application is pending before the committee, if it finds that such suspension is in the public interest.

Source. #10994, eff 12-16-15

Site 301.13 Criteria Relative to Findings of Financial, Technical, and Managerial Capability.

(a) In determining whether an applicant has the financial capability to construct and operate the proposed energy facility, the committee shall consider:

(1) The applicant's experience in securing funding to construct and operate energy facilities similar to the proposed facility;

(2) The experience and expertise of the applicant and its advisors, to the extent the applicant is relying on advisors;

(3) The applicant's statements of current and pro forma assets and liabilities; and

(4) Financial commitments the applicant has obtained or made in support of the construction and operation of the proposed facility.

(b) In determining whether an applicant has the technical capability to construct and operate the proposed facility, the committee shall consider:

(1) The applicant's experience in designing, constructing, and operating energy facilities similar to the proposed facility; and

(2) The experience and expertise of any contractors or consultants engaged or to be engaged by the applicant to provide technical support for the construction and operation of the proposed facility, if known at the time.

(c) In determining whether an applicant has the managerial capability to construct and operate the proposed facility, the committee shall consider:

(1) The applicant's experience in managing the construction and operation of energy facilities similar to the proposed facility; and

(2) The experience and expertise of any contractors or consultants engaged or to be engaged by the applicant to provide managerial support for the construction and operation of the proposed facility, if known at the time.

Source. #10994, eff 12-16-15

Site 301.14 Criteria Relative to Findings of Unreasonable Adverse Effects.

(a) In determining whether a proposed energy facility will have an unreasonable adverse effect on aesthetics, the committee shall consider:

(1) The existing character of the area of potential visual impact;

(2) The significance of affected scenic resources and their distance from the proposed facility;

(3) The extent, nature, and duration of public uses of affected scenic resources;

(4) The scope and scale of the change in the landscape visible from affected scenic resources;

(5) The evaluation of the overall daytime and nighttime visual impacts of the facility as described in the visual impact assessment submitted by the applicant and other relevant evidence submitted pursuant to Site 202.24;

(6) The extent to which the proposed facility would be a dominant and prominent feature within a natural or cultural landscape of high scenic quality or as viewed from scenic resources of high value or sensitivity; and

(7) The effectiveness of the measures proposed by the applicant to avoid, minimize, or mitigate unreasonable adverse effects on aesthetics, and the extent to which such measures represent best practical measures.

(b) In determining whether a proposed energy facility will have an unreasonable adverse effect on historic sites, the committee shall consider:

(1) All of the historic sites and archaeological resources potentially affected by the proposed facility and any anticipated potential adverse effects on such sites and resources;

(2) The number and significance of any adversely affected historic sites and archeological resources, taking into consideration the size, scale, and nature of the proposed facility;

(3) The extent, nature, and duration of the potential adverse effects on historic sites and archeological resources;

(4) Findings and determinations by the New Hampshire division of historical resources of the department of cultural resources and, if applicable, the lead federal agency, of the proposed facility's effects on historic sites as determined under Section 106 of the National Historic Preservation Act, 54 U.S.C. §306108, or RSA 227-C:9; and

(5) The effectiveness of the measures proposed by the applicant to avoid, minimize, or mitigate unreasonable adverse effects on historic sites and archaeological resources, and the extent to which such measures represent best practical measures.

(c) In determining whether a proposed energy facility will have an unreasonable adverse effect on air quality, the committee shall consider the determinations of the New Hampshire department of environmental services with respect to applications or permits identified in Site 301.03(d) and other relevant evidence submitted pursuant to Site 202.24.

(d) In determining whether a proposed energy facility will have an unreasonable adverse effect on water quality, the committee shall consider the determinations of the New Hampshire department of environmental services, the United States Army Corps of Engineers, and other state or federal agencies having permitting or other regulatory authority, under state or federal law, to regulate any aspect of the construction or operation of the proposed facility, with respect to applications and permits identified in Site 301.03(d), and other relevant evidence submitted pursuant to Site 202.24.

(e) In determining whether construction and operation of a proposed energy facility will have an unreasonable adverse effect on the natural environment, including wildlife species, rare plants, rare natural communities, and other exemplary natural communities, the committee shall consider:

(1) The significance of the affected resident and migratory fish and wildlife species, rare plants, rare natural communities, and other exemplary natural communities, including the size, prevalence, dispersal, migration, and viability of the populations in or using the area;

(2) The nature, extent, and duration of the potential effects on the affected resident and migratory fish and wildlife species, rare plants, rare natural communities, and other exemplary natural communities;

(3) The nature, extent, and duration of the potential fragmentation or other alteration of terrestrial or aquatic significant habitat resources or migration corridors;

(4) The analyses and recommendations, if any, of the department of fish and game, the natural heritage bureau, the United States Fish and Wildlife Service, and other agencies authorized to identify and manage significant wildlife species, rare plants, rare natural communities, and other exemplary natural communities;

(5) The effectiveness of measures undertaken or planned to avoid, minimize, or mitigate potential adverse effects on the affected wildlife species, rare plants, rare natural communities, and other exemplary natural communities, and the extent to which such measures represent best practical measures;

(6) The effectiveness of measures undertaken or planned to avoid, minimize, or mitigate potential adverse effects on terrestrial or aquatic significant habitat resources, and the extent to which such measures represent best practical measures; and

(7) Whether conditions should be included in the certificate for post-construction monitoring and reporting and for adaptive management to address potential adverse effects that cannot reliably be predicted at the time of application.

(f) In determining whether a proposed energy facility will have an unreasonable adverse effect on public health and safety, the committee shall:

(1) For all energy facilities, consider the information submitted pursuant to Site 301.08 and other relevant evidence submitted pursuant to Site 202.24, the potential adverse effects of construction and operation of the proposed facility on public health and safety, the effectiveness of measures undertaken or planned to avoid, minimize, or mitigate such potential adverse effects, and the extent to which such measures represent best practical measures;

(2) For wind energy systems, apply the following standards:

a. With respect to sound standards, the A-weighted equivalent sound levels produced by the applicant's energy facility during operations shall not exceed the greater of 45 dBA or 5 dBA above background levels, measured at the L-90 sound level, between the hours of 8:00 a.m. and 8:00 p.m. each day, and the greater of 40 dBA or 5 dBAabove background levels, measured at the L-90 sound level, at all other times during each day, as measured using microphone placement at least 7.5 meters from any surface where reflections may influence measured sound pressure levels, on property that is used in whole or in part for permanent or temporary residential purposes, at a location between the nearest building on the property used for such purposes and the closest wind turbine; and

b. With respect to shadow flicker, the shadow flicker created by the applicant's energy facility during operations shall not occur more than 8 hours per year at or within any residence, learning space, workplace, health care setting, outdoor or indoor public gathering area, or other occupied building;

(3) For wind energy systems, consider the proximity and use of buildings, property lines, public roads, and overhead and underground energy infrastructure and energy transmission pipelines, the risks of ice throw, blade shear, tower collapse, and other potential adverse effects of facility operation, and the effectiveness of measures undertaken or planned to avoid, minimize, or mitigate such potential adverse effects, and the extent to which such measures represent best practical measures;

(4) For electric transmission lines, consider the proximity and use of buildings, property lines, and public roads, the risks of collapse of towers, poles, or other supporting structures, the potential impacts on public health and safety of electric and magnetic fields generated by the proposed facility, and the effectiveness of measures undertaken or planned to avoid, minimize, or mitigate such potential adverse effects, and the extent to which such measures represent best practical measures;

(5) For high pressure gas pipelines, apply the following standards:

a. With respect to sound standards for interstate pipelines, the noise attributable to any new compressor station, compression added to an existing station, or any modification, upgrade or update of an existing station, shall not exceed a day-night sound level (Ldn) of 55 dBA at any pre-existing noise-sensitive area, such as schools, hospitals, or residences, as provided in 18 CFR §380.12(k), available as noted in Appendix B;

b. With respect to sound standards for intrastate pipelines, the noise attributable to any new compressor station, compression added to an existing station, or any modification, upgrade or update of an existing station, shall not exceed the standards set forth in (2)a., above, regarding wind energy systems;

c. With respect to vibration, compressor stations or modifications of existing compressor stations shall not result in a perceptible increase in vibration at any pre-existing noise-sensitive area, such as schools, hospitals, or residences, as provided in 18 CFR §380.12(k), available as noted in Appendix B, or a level of 2.0 peak particle velocity, whichever is less;

d. With respect to exterior lighting at compressor stations, no light shall be projected above the horizontal plane or projected beyond the property lines;

e. With respect to pipeline construction and safety, the requirements in Puc 506 and Puc 508 for a class 4 location in a high consequence area, as those terms are defined in 49 CFR §192.5(b)(4) and 49 CFR §192.903, available as noted in Appendix B, respectively; and

(6) For high pressure gas pipelines, consider:

a. The results of the comprehensive health impact assessment;

b. The proximity of electric transmission lines to the high pressure gas pipeline;

c. The proximity of any compressor station to schools, day-care centers, health care facilities, residences, residential neighborhoods, places of worship, elderly care facilities, and farms;

d. The effectiveness of measures undertaken or planned to avoid, minimize, or mitigate such potential adverse effects; and

e. The extent to which the measures in d. represent best practical measures.

Source. #10994, eff 12-16-15; amd by #11156, eff 8-16-16

Site 301.15 Criteria Relative to a Finding of Undue Interference. In determining whether a proposed energy facility will unduly interfere with the orderly development of the region, the committee shall consider:

(a) The extent to which the siting, construction, and operation of the proposed facility will affect land use, employment, and the economy of the region;

(b) The provisions of, and financial assurances for, the proposed decommissioning plan for the proposed facility; and

(c) The views of municipal and regional planning commissions and municipal governing bodies regarding the proposed facility.

Source. #10994, eff 12-16-15

Site 301.16 Criteria Relative to Finding of Public Interest. In determining whether a proposed energy facility will serve the public interest, the committee shall consider:

(a) The welfare of the population;

(b) Private property;

(c) The location and growth of industry;

(d) The overall economic growth of the state;

(e) The environment of the state;

(f) Historic sites;

(g) Aesthetics;

(h) Air and water quality;

(i) The use of natural resources; and

(j) Public health and safety.

Source. #10994, eff 12-16-15

Site 301.17 Conditions of Certificate. In determining whether a certificate shall be issued for a proposed energy facility, the committee shall consider whether the following conditions should be included in the certificate in order to meet the objectives of RSA 162-H:

(a) A requirement that the certificate holder promptly notify the committee of any proposed or actual change in the ownership or ownership structure of the holder or its affiliated entities and request approval of the committee of such change;

(b) A requirement that the certificate holder promptly notify the committee of any proposed or actual material change in the location, configuration, design, specifications, construction, operation, or equipment components of the energy facility subject to the certificate and request approval of the committee of such change;

(c) A requirement that the certificate holder continue consultations with the New Hampshire division of historical resources of the department of cultural resources and, if applicable, the federal lead agency, and comply with any agreement or memorandum of understanding entered into with the New Hampshire division of historical resources of the department of cultural resources and, if applicable, the federal lead agency;

(d) Delegation to the administrator or another state agency or official of the authority to monitor the construction or operation of the energy facility subject to the certificate and to ensure that related terms and conditions of the certificate are met;

(e) Delegation to the administrator or another state agency or official of the authority to specify the use of any technique, methodology, practice, or procedure approved by the committee within the certificate and with respect to any permit, license, or approval issued by a state agency having permitting or other regulatory authority;

(f) Delegation to the administrator or another state agency or official of the authority to specify minor changes in route alignment to the extent that such changes are authorized by the certificate for those portions of a proposed electric transmission line or energy transmission pipeline for which information was unavailable due to conditions which could not have been reasonably anticipated prior to the issuance of the certificate;

(g) A requirement that the energy facility be sited subject to setbacks or operate with designated safety zones in order to avoid, mitigate, or minimize potential adverse effects on public health and safety;

(h) Other conditions necessary to ensure construction and operation of the energy facility subject to the certificate in conformance with the specifications of the application; and

(i) Any other conditions necessary to serve the objectives of RSA 162-H or to support findings made pursuant to RSA 162-H:16.

Source. #10994, eff 12-16-15

Site 301.18 Sound Study Methodology.

(a) The methodology for conducting a preconstruction sound background study for a wind energy system shall include:

(1) Adherence to the standard of ANSI/ASA S12.9-2013 Part 3, available as noted in Appendix B, a standard that requires short-term attended measurements;

(2) Long-term unattended monitoring shall be conducted in accordance with the standard of ANSI S12.9-1992 2013 Part 2, available as noted in Appendix B, provided that audio recordings are taken in order to clearly identify and remove transient noises from the data, with frequencies above 1250 hertz 1/3 octave band to be filtered out of the data;

(3) Measurements shall be conducted at the nearest properties from the proposed wind turbines that are representative of all residential properties within 2 miles of any turbine; and

(4) Sound measurements shall be omitted when the wind velocity is greater than 4 meters per second at the microphone position, when there is rain, or with temperatures below instrumentation minima; following the protocol of ANSI S12.9-2013 Part 3, available as noted in Appendix B:

a. Microphones shall be placed 1 to 2 meters above ground level, and at least 7.5 meters from any reflective surface;

b. A windscreen of the type recommended by the monitoring instrument's manufacturer must be used for all data collection;

c. Microphones should be field-calibrated before and after measurements; and

d. An anemometer shall be located within close proximity to each microphone.

(b) Pre-construction sound reports shall include a map or diagram clearly showing the following:

(1) Layout of the project area, including topography, project boundary lines, and property lines;

(2) Locations of the sound measurement points;

(3) Distance between any sound measurement point and the nearest wind turbine;

(4) Location of significant local non-turbine sound and vibration sources;

(5) Distance between all sound measurement points and significant local sound sources;

(6) Location of all sensitive receptors including schools, day-care centers, health care facilities, residences, residential neighborhoods, places of worship, and elderly care facilities;

(7) Indication of temperature, weather conditions, sources of ambient sound, and prevailing wind direction and speed for the monitoring period; and

(8) Final report shall provide A-weighted and C-weighted sound levels for L-10, Leq, and L-90.

(c) The predictive sound modeling study shall:

(1) Be conducted in accordance with the standards and specifications of ISO 9613-2 1996-12-15, available as noted in Appendix B;

(2) Include an adjustment to the Leq sound level produced by the model applied in order to adjust for turbine manufacturer uncertainty, such adjustment to be determined in accordance with the most recent release of the IEC 61400 Part 11 standard (Edition 3.0 2012-11), available as noted in Appendix B;

(3) Include predictions to be made at all properties within 2 miles from the project wind turbines for the wind speed and operating mode that would result in the worst case wind turbine sound emissions during the hours before 8:00 a.m. and after 8:00 p.m. each day; and

(4) Incorporate other corrections for model algorithm error to be disclosed and accounted for in the model.

(d) The predictive sound modeling study report shall:

(1) Include the results of the modeling described in (c)(3) above as well as a map with sound contour lines showing dBA sound emitted from the proposed wind energy system at 5 dBA intervals;

(2) Include locations out to 2 miles from any wind turbine included in the proposed facility; and

(3) Show proposed wind turbine locations and the location of all sensitive receptors, including schools, day-care centers, health care facilities, residences, residential neighborhoods, places of worship, and elderly care facilities.

(e) Post-construction noise compliance monitoring shall include:

(1) Adherence to the standard of ANSI/ASA S12.9-2013 Part 3, available as noted in Appendix B, that requires short-term attended measurements to ensure transient noises are removed from the data, and measurements shall include at least one nighttime hour where turbines are operating at full sound power with winds less than 3 meters per second at the microphone;

(2) Unattended long-term monitoring shall also be conducted;

(3) Sound measurements shall be omitted when there is rain, or when temperatures are below instrumentation minima, and shall comply with the following additional specifications:

a. Microphones shall be placed 1 to 2 meters above ground level and at least 7.5 meters from any reflective surface, following the protocols of ANSI/ASA S12.9-2013 Part 3, available as noted in Appendix B;

b. Proper microphone screens shall be required;

c. Microphones shall be field-calibrated before and after measurements; and

d. An anemometer shall be located within close proximity to each microphone;

(4) Monitoring shall involve measurements being made with the turbines in both operating and non-operating modes, and supervisory control and data acquisition system data shall be used to record hub height wind speed and turbine power output;

(5) Locations shall be pre-selected where noise measurements will be taken that shall be the same locations at which predictive sound modeling study measurements were taken pursuant to subsection (c) above, and the measurements shall be performed at night with winds above 4.5 meters per second at hub height and less than 3 meters per second at ground level;

(6) All sound measurements during post-construction monitoring shall be taken at 0.125-second intervals measuring both fast response and Leqmetrics; and

(7) Post-construction monitoring surveys shall be conducted once within 3 months of commissioning and once during each season thereafter for the first year, provided that:

a. Additional surveys shall be conducted at the request of the committee or the administrator; and

b. Adjustments to this schedule shall be permitted, subject to review by the committee or the administrator.

(f) Post-construction sound monitoring reports shall include a map or diagram clearly showing the following:

(1) Layout of the project area, including topography, project boundary lines, and property lines;

(2) Locations of the sound measurement points; and

(3) Distance between any sound measurement point and the nearest wind turbine.

(g) For each sound measurement period during post-construction monitoring, reports shall include each of the following measurements:

(1) LAeq, LA-10, and LA-90; and

(2) LCeq, LC-10, and LC-90.

(h) Noise emissions shall be free of audible tones, and if the presence of a pure tone frequency is detected, a 5 dB penalty shall be added to the measured dBA sound level.

(i) Validation of noise complaints submitted to the committee shall require field sound surveys, except as determined by the administrator to be unwarranted, which field studies shall be conducted under the same meteorological conditions as occurred at the time of the alleged exceedance that is the subject of the complaint.

Source. #10994, eff 12-16-15

Addendum B to Applicants' Notice of Appeal

Statements of SC Members During Deliberations Concerning the "Region"

"I think also, too, the Applicant said when you look at the region as a whole, that you're not going to get an unreasonable impact. And, you know, that's something we may have to chat about at some point is region versus the sum of its parts. I mean, you can't have a region without the sum of its parts. And so you kind of have to talk about individual communities and impacts. Some communities I don't think will be overly impacted and some will be a little bit more so. When you look at Plymouth, you know, I think the testimony we've had, the letters, the comments from business owners, this will create an impact. I tend to put a lot of stock in that. I think business owners tend to know their customers. I think business owners tend to know the tolerance of their customers for change. They know how much they'll spend. I think there was one comment early on that, "Well, maybe they could get them to spend more." But businesses figured that out quite a while ago, and if they could, they would." A. 1138-1139.

"I'm still interested, and I brought this up yesterday, this idea of the "region," everything being measured by the region. And I understand that we say "region" in the rules and in the statute. But what constitutes that region? Because the other thing, too, is you don't want to minimize the municipalities that combined make up that region. So if we're looking at it as one whole, why are we even getting the input of municipalities? So I think there's got to be more discussion about, are we looking at this project in chunks, in regions? Is it the sum of its parts? I'm not clear on that yet. I think that's important here because I think there are places where there are certainly concerns. But I think, as the Applicant would say, but if you look at it as a whole, regionally, the whole project, it's not unreasonable." A. 1250-1251.

"I do believe there's going to be an impact to business, and that impact's been washed away by simply referring to the Project as a "region-wide basis," the region as a whole. I think we've heard from several businesses, particularly in the underground route. They believe the Project could negatively impact their operations. Don't think this is to be dismissed, as small businesses are the cornerstone of our economic development." A. 1485-1486.

"Once again, I see the communities as summing up to the regions…Impact to property values. In the same vein, I'm not sure I accept the argument that there will be no impact to property values. It just doesn't make sense to me that there won't be any. But once again, if we sort of wash it into a region, I guess that's the statement that can be made." A. 1487-1488.

"And where I need sort of help with that is, yes, downtown Plymouth is not a "region." But when you look at the region, you know, it's somewhere people in Rumney or in

Woodstock or in Campton or in Thornton, you know, where do they go shopping? You know, it's -- you know, Bridgewater, you go through Plymouth to get to the grocery stores. And, you know, a lot of those communities up there don't have the services or the businesses, and they go to a place like Plymouth to get those services. So I don't know -- yes, it's a very defined area, downtown Plymouth. But could the work in downtown Plymouth affect the region because that's where everybody goes in the region? So, you know, that's where I don't know. Rely on your expertise for that." A. 1140-1141.

"Mr. Way, I guess a thought in response to your question about what does the "region" mean, or what areas do we have to consider. It's different in different parts of the statute and different parts of our own rules. In some places we are directed to look at what's going on within the affected municipalities, and in some instances it seems like we're being directed to talk about a region that may even be larger than the state of New Hampshire, and there are gradations in between. That's something I think that we might want to have a non-meeting with our own lawyer to talk about that. But it's also something that in some areas we're just going to have to wrestle with and decide what's important, given the particular criterion or set of criteria that we're considering at the time. For example, I happen to know because I've just been looking at it, that the property values inquiry in the rules is directed at the specific municipalities. Doesn't talk about anything beyond that when you're talking about property values." Chairman Honigberg, A. 1259-1260.

"Because a "neighborhood" in Coos County might encompass many square miles of land versus in Concord or elsewhere it might be a block or two. So, again, I think this goes back to that question of yours, Mr. Way, about what constitutes a "region." And I think in agreement with some other people that have spoken, a region is very different if we're talking about maybe Coos County versus some of the other counties or some of the other municipalities." Ms. Dandeneau, A. 1265.

"And by 'region,' my thoughts would be the region that the transmission line would be constructed through." Commissioner Bailey, A. 1507.

Addendum C to Applicants' Notice of Appeal

I. Applicable rule regarding undue interference with orderly development of the region

Site 301.15 Criteria Relative to a Finding of Undue Interference. In determining whether a proposed energy facility will unduly interfere with the orderly development of the region, the committee shall consider:

(a) The extent to which the siting, construction, and operation of the proposed facility will affect land use, employment, and the economy of the region;

(b) The provisions of, and financial assurances for, the proposed decommissioning plan for the proposed facility; and

(c) The views of municipal and regional planning commissions and municipal governing bodies regarding the proposed facility.

II. The Committee's prior application of the rule

In the Groton Wind proceeding, a subcommittee stated as follows:

> In considering whether the Project will unduly interfere with the orderly development of the region, the Subcommittee must first determine whether such interference impacts the entire region, as opposed to a limited number of residences. Thereafter, the Subcommittee must consider whether the degree of such interference is so excessive that it warrants mitigation or denial of the Certificate.

Decision Granting Certificate of Site and Facility, *Groton Wind*, Docket No. 2010, p. 38 (May 6, 2011). A. 1954.

III. Standard applied by the Committee during deliberations and findings made

A. Land Use

1. Standards Applied In Deliberations

a. "The Applicant has acknowledged that the construction of this project will cause **some temporary adverse effect** on land use." A. 949.[64]

[64] Boldface type is added for emphasis.

b. "I just keep coming back to the scale, scope and nature of this project. And not only is it **significantly different than what's in the corridor,** in order to place it in the corridor they need to make other changes in the corridor as well." A. 1262 (Wright).

c. "You know, they bought their homes. The **land use is for the view**, you know, and that's going to break up that. So **I know part of that's aesthetics**. But, you know, the land use up there, to me that changes what that land use is." A. 1286 (Oldenburg).

d. "I don't think there was enough interaction with stakeholders to determine if the siting and construction would **unduly affect the prevailing land use**." A. 1487 (Way).

e. "I'm concerned about vegetative clearing, particularly in the new right-of-way up north, in that that vegetative clearing will have **an impact** on land use." A. 1490 (Dandeneau).

f. "[L]and use, especially up north, **would be impacted**. And to some degree, all the areas **would be impacted** from a land-use standpoint, some less than others I would think, especially in the existing right-of-way." A. 1497 (Oldenburg).

g. "What has to happen for it to fail? I didn't get a sense of that. So, you know, it was sort of a, you know, on the far end of the spectrum, well, what if it was 500 feet tall? You know, it would still be within the prevailing land use…But you know, at what point do we **go beyond the boundaries of what is considered a structure within that right-of-way**…when does something e**xpand beyond its intended use, a nonconforming structure**, as I think as you said yesterday, Ms. Weathersby." A. 1249-1250 (Way).

h. "Is there **a tipping point** when we get to there is a prevailing change in the land use?" A. 1253 (Wright).

i. I use this as guidance. And those three factors that are generally used when considering whether there's been a s**ubstantial change in that pre-existing nonconforming use** is: The extent to which the use being questioned reflects the nature and purpose of the pre-existing nonconforming use; whether the use is merely a different manner of using the original nonconforming use or whether it constitutes a use that's different in its character, nature and kind; and third, whether the use will have a substantially

different effect upon the neighborhood." A. 1263-1264 (Weathersby).

j. "I think in certain places this project will have a **substantially different** effect **on the neighborhood**. And I think in other certain places the use is different in its character, nature and kind." A. 1264 (Weathersby).

k. "[I]t's such an expansion, in my mind, **that it tips**, such that it becomes a different use than what is **presently in the corridor**." A. 1264 (Weathersby).

l. There's going to be a point at which it's no longer the same kind of use. And that's completely separate and apart from the property rights aspect of things, **the overuse of the easement. That's not something we can adjudicate. That's not something we're here to adjudicate"** A. 1267-1268 (Honigberg).

m. "[T]here's the realities of having a right-of-way in your property. There is a reality that it's going to be expanded, that they have rights to clear…And where we're focusing upon I think is, as someone said, that 'tipping point.' There is that tipping **point where it isn't something that one would come to expect or ever expect in that right-of-way**." A. 1268-1269 (Way).

n. "And then the question is…how do we take that **tipping point and meld it into our rules.** There's an on/off thing. It's either with prevailing land use or it's not. I'm also thinking **we're talking about aesthetics here**, particularly as we talk about intensification, the aesthetics from the neighborhood and the rural character that's encouraged by master plans." A. 1269 (Way).

o. "I think we brought up the issue of that t**ipping point when it's no** longer **conforming** with what was the original intent and design for the ROW." A. 1486 (Way).

p. "I do think there's a **tipping point** in which the nonconforming use, such as the use of the corridor for the Northern Pass Transmission Project, becomes a different use in some places, and I do believe that will be the case." A. 1495 (Weathersby).

2. Findings in Order

a. In essence, Mr. Varney suggests that as long as a corridor is used for transmission lines, there can never be a **"tipping point"** where the effect of transmission infrastructure on the land use becomes too intense. We disagree. Order A. 285-286.

b. Over-development of an existing transmission corridor **can impact** land uses in the area of the corridor and unduly interfere with the orderly development of the region. Order A. 286.

c. While not legally required to **apply the three prong analysis**, we find it to be informative in the context of this case. There are areas along the route where the introduction of the Project with its increased tower heights and reconfiguration of existing facilities would create a use that is different in character, nature and kind from the existing use. (Regarding non-conforming use issue). Order A. 287.

d. The overdevelopment **of the right-of-way** is also apparent from the plans requiring significant reconfiguration and reconstruction of existing infrastructure in order to accommodate the infrastructure required by the Project. Order A. 288.

e. Given the nature of the master plans and local ordinances along the Project's route, the Project would have a **large and** negative **impact** on land uses in many communities that make up the region affected by the Project. Order A. 289.

f. We recognize that the public roads under which the Project would run would remain public roads. However, the Applicant directed little, if any, attention to the effects that the underground portion of the Project may have on the surrounding land uses. It is possible that there would be **no negative effect,** but the record contains little to assist us in making that determination. Order A. 289.

B. Property Values

1. Standards Applied in Deliberations

a. Ms. Weathersby: "I think it depends a little bit if you're talking about **interference with private property**, like, oh, you need to take down my tree in order to get the line in versus do they need private property to construct – do they need to acquire private

property to put the line in…So it just all comes back to that we don't have a survey of the actual width of the right-of-way." A. 1063-1064.

b. "I guess the question I have for the Committee, and I'm not suggesting anything here, but is everybody accepting the fact – is it straight face that there's not going to be **an impact** on property values as a result of this structure, this project?" A. 1333 (Way).

c. "Well, I mean, there's **no impact** to property values that's being proposed. Do we accept that as a committee?" A. 1334 (Way).

d. "My gut reaction…the fact that the conclusion's that would be **no** impacts outside of things 100 feet away doesn't seem to me to be credible. I'm not sure I can pinpoint something to that, but it just doesn't seem credible to me." A. 1336-1337 (Wright).

e. "I'm not sure I accept the argument that there will be **no impact** to property values. It just doesn't make sense to me that there won't be any." A. 1488 (Way).

f. "I do believe, as the other folks have stated, that the property values will **be impacted in a negative way**." A. 1497 (Oldenburg).

g. "With respect to the real estate values, I did not find the witness credible. I thought there was a lot of gaps. I thought we received significant evidence from other parties that there **could be real estate impacts** from the Project." A. 1501 (Wright).

h. "I don't believe that the Applicant has met its burden to demonstrate that there will not be **an impact** on property value." A. 1504 (Bailey) (Should be noted that further down Bailey does acknowledge that we concluded there would be impacts to 9 properties).

2. Findings in Order

a. While Dr. Chalmers approach was broad, the Subcommittee finds the report and testimony to be insufficient to demonstrate that the Project **will not have an unreasonably adverse impact on real estate values throughout the region**. Order A. 202.

b. The literature, as reviewed by Dr. Chalmers, does not support the Applicant's position that **one cannot presume an effect on**

property **value** from HVTL. In fact, the literature review as presented in this case supports the intuitive position that HVTLs negatively impact real estate values. *Order* at 195.

c. Dr. Chalmers' New Hampshire case study analysis did not persuade us that **there would be no discernible decrease in** property **values** attributable to the Project. Order A. 203.

d. This decision undermines the reliability of his report as it does not contemplate the possibility that some of the indeterminate properties may have suffered **a negative price effect** attributable to the HVTL. Order A. 203.

e. The Subcommittee believes that properties that are encumbered by the right-of-way and properties that are not encumbered by the right-of-way **will be affected** by the Project. Order A. 207.

C Tourism

1. Standards Applied in Deliberations

a. "[T]he bottom line I think is if someone came to me right now and I, you know, maybe I can be convinced, but if someone said **will this have an impact on tourism,** you know, I suspect that it's not going to have the impact that a lot of people say it's going to have." A. 1450 (Way).

b. "So I don't think this is going to have the impact that they say or that some would say, but **it is going to have an impact** for some." A. 1451 (Way).

c. "I agree with what you said about I don't think that it will have the impact on tourism that people are most worried about. It's a very emotional topic. But **I don't know what the impact will be** from this testimony. I really don't know." A. 1452 (Bailey).

d. "I do not believe the Applicant has met the burden of proof **that there will be no impact on tourism.**" A. 1487 (Way).

e. "I am not convinced that the construction phase of this project would not have **an** impact **on tourism and the economy**." A. 1489-1490 (Dandeneau).

f. "Concerning tourism, I also believe the Applicant didn't demonstrate that **there will** not **be undue interference to**

tourism from this project either during construction and particularly over the long term." A. 1496 (Weathersby).

g. "The analysis by Mr. Nichols was deficient in many respects, and I was left unpersuaded that New Hampshire tourism **will not be** unduly **influenced in a negative manner.**" A. 1496 (Weathersby).

h. "I believe there will be **an impact** on tourism." A. 1496 (Oldenburg).

i. "I also…have not been convinced that there wouldn't be **an impact** on tourism. There may not be, but I don't know. I think the testimony in that regard was not sufficient to demonstrate that there wouldn't be." A. 1595 (Bailey).

2. Findings in Order

a. While reaching his conclusion of **"no impact,"** Mr. Nichols relied, in part, on the results of poorly designed listening sessions and a dubious online survey. Order A. 233.

b. Mr. Nichols' report and pre-filed testimony failed to address and analyze the **impact that construction work** over an extended period of time could have on tourism. Order A. 234.

c. At best, we are no better off than we were before the evidentiary hearing. The Project **may have a negative impact on tourism or it may not**, although there are valid reasons to believe that the Project would hurt tourism if it were built. Order A. 234-235.

Northern Pass Transmission LLC and Public Service Company

of New Hampshire dba Eversource Energy

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Master Service List

Site 102.47, 202.07

Committee Staff

Administrator, Site Evaluation Committee Pamela Monroe 21 S. Fruit St., Suite 10 Concord, NH 03301 Pamela.Monroe@sec.nh.gov Jody Carmody Jody.carmody@puc.nh.gov	

Northern Pass Transmission LLC and Public Service Company of New Hampshire dba Eversource Energy
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Master Service List
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Counsel for Public

Counsel for the Public NH Department of Justice Christopher G. Aslin, Assistant Attorney General 33 Capitol St. Concord, NH 03301 Christopher.aslin@doj.nh.gov	Laura Maynard NH Department of Justice 33 Capitol St. Concord, NH 03301 Laura.maynard@doj.nh.gov
Primmer Piper Eggleston & Cramer Thomas Pappas Doreen Connor 900 Elm Street Manchester, NH TPappas@primmer.com dconnor@primmer.com	Primmer Piper Eggleston & Cramer Eli Emerson 106 Main Street Littleton, NH EEmerson@primmer.com
Primmer Piper Eggleston & Cramer Sandra Merrigan 900 Elm Street Manchester, NH smerrigan@primmer.com	

Intervenors

Municipal Group 1 North

Holly Galietta, Administrative Assistant Town of Pittsburg 1526 Main Street Pittsburg, NH 03592 townofficepittsburg@gmail.com sellis46@outlook.com	Selectmen, Town of Clarksville Helene L. Dionne Town Clerk Administrative Assistant Clarksville, NH twnclark@yahoo.com
Town of Stewartstown Rita M. Hibbard Town Clerk Stewartstown, NH townofstewartstown@hotmail.com	Town of Colebrook Dorothy Uran Assessing Clerk Colebrookassessing@colebrooknh.org
Coos County Commissioner District Three Rick Samson 804 Piper Hill Road Stewartstown NH. 03576 hyrgnd@gmail.com	

Northern Pass Transmission LLC and Public Service Company of New Hampshire dba Eversource Energy
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Master Service List
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Municipal Group 1 South

Town of Whitefield Stanley Holz saholz@myfairpoint.net	Whitefield Planning Board 56 Littleton Road Whitefield, NH 03598 whitefieldtax@ne.rr.com
Dalton Selectboard Nancy McVetty, Chair admin-assistant@townofdalton.com	Dalton Select Board and the Dalton Conservation Commission Edward Craxton ecraxton@yahoo.com
Dalton Conservation Commission Christine Rouillard nadiapeanut@yahoo.com	Bethlehem Board of Selectman Sandy Laleme racers74@roadrunner.com
Town of Bethlehem Planning Board 2155 Main Street Bethlehem, NH 03574 Planning@BethlehemNH.org	Town of Bethlehem PO Box 189 Bethlehem NH 03574 Admin@BethlehemNH.org
Bethlehem Conservation Commission Cheryl Jensen PO Box 189 Bethlehem, NH 03574 cheryljensen448@gmail.com	Town of Northumberland Shawn M. Tanguay Gardner Fulton & Waugh PLLC 78 Bank Street Lebanon, NH 03766 stanguay@townandcitylaw.com
Town of Littleton Mitchell Municipal Group, P.A. Steven Whitley 25 Beacon Street East Laconia, NH 03246 steven@mitchellmunigroup.com	

Municipal Group 2

Town of Sugar Hill Margo Connors connorsmargo@gmail.com	Franconia Planning Board Thaddeus D. Presby Franconia, NH 03580 Thad.presby@presbyc.com
Town of Franconia Conservation Commission drginnyjeff@hotmail.com	Town of Easton Deborah Stever steverselectperson@gmail.com Zak Mei Zakmei.e@gmail.com

Northern Pass Transmission LLC and Public Service Company of New Hampshire dba Eversource Energy
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Master Service List
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Easton Planning Board James Collier, Chair 1060 Easton Valley Road Easton, NH 03580	Easton Conversation Commission Roy R. Stever, Chair 1060 Easton Valley Road Easton, NH 03580 Roy.stever@gmail.com
Town of Plymouth Brian Murphy Land Use & Planning Director 6 Post Office Square Plymouth, NH 03264 bmurphy@plymouth-nh.org	Town of Plymouth Jaseya Girona Executive Assistant 6 Post Office Square Plymouth, NH 03264 jgirona@plymouth-nh.org
Christine Fillmore Gardner Fulton & Waugh PLLC 78 Bank Street Lebanon, NH 03766 cfillmore@townandcitylaw.com	

Municipal Group 3 North

Holderness Town Administrator Michael Capone administrator@holderness-nh.gov	Holderness Conservation Commission Larry Spencer PO Box 203 Holderness, NH 03245 landuse@holderness-nh.gov
Ashland Conservation Commission PO Box 517 Ashland, NH 03217 ashlandconcom@gmail.com	Town of Ashland 20 Highland Street Ashland, NH 03217 pcrowell@ashland.nh.gov
Ashland Water & Sewer Department Ellison Badger, Chair 6 Collins Street Ashland, NH 03217 waterandsewer@ashland.nh.gov	Town of Bristol Nik Coates, Town Administrator 230 Lake Street Bristol, NH 03222 townadmin@townofbristolnh.org
Town of New Hampton Mitchell Municipal Group, P.A. Steven Whitley 25 Beacon Street East Laconia, NH 03246 steven@mitchellmunigroup.com	

Northern Pass Transmission LLC and Public Service Company of New Hampshire dba Eversource Energy
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Municipal Group 3 South

Town of Canterbury Ken Folsom, Town Administrator PO Box 500 Canterbury, NH 03224 kfolsom@canterbury-nh.org	City of Concord Deputy City Solicitor Danielle L. Pacik 41 Green Street Concord, NH 03301 dpacik@concordnh.gov
Pembroke Conservation Commission Ammy Heiser, Chairman 604 Buck Street Pembroke, NH, 03275 harunga1@msn.com	Town of Deerfield Jeanette Foisy Town Administrator PO Box 159 Deerfield, NH bos@townofdeerfieldnh.com
Grafton County Commissioners 3855 Dartmouth College Highway Box 1 North Haverhill, NH 03774 cmsroffice@co.grafton.nh.us	Deerfield Conservation Commission Judy Marshall, Clerk PO Box 159 Deerfield, NH 03037 marshallgj@metrocast.net

City of Franklin Wescott Law Paul Fitzgerald 28 Bowman Street Laconia, NH 03246 pfitzgerald@wescottlawnh.com	City of Berlin Donahue, Tucker & Ciandella, PLLC Chris Boldt 164 NH Rt. 25 The Towle House, Unit 2 Meredith, NH 03253 cboldt@dtclawyers.com
Martha Richards, Grafton County Commissioner 3785 Dartmouth College Highway North Haverhill NH 03774 maplerichards@gmail.com	Lara Saffo Grafton County Commissioners lsaffo@co.grafton.nh.us

Combined Group of Intervenors Clarksville-Stewartstown

Charles and Donna Jordan 647 West Road Clarksville, NH 03592 donna@colebrookchronicle.com	Sally Zankowski PO Box 135 Colebrook, NH 03576
Jon and Lori Levesque 107 Oak Street Gonic, NH 03839 lorilevesqu@yahoo.com	Bradley J. and Daryl D. Thompson 599 Noyes Road Stewartstown, NH 03576 bjtddt@gmail.com

Northern Pass Transmission LLC and Public Service Company of New Hampshire dba Eversource Energy
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Master Service List
Site 102.47, 202.07

Nancy L. Dodge 157 Creampoke Rd. Stewartstown NH 03576	Arlene Placey* 944 Bear Rock Road Stewartstown, NH 03576
Lynne Placey* 1043 South Hill Road Stewartstown, NH 03576	Roderick and Donna McAllaster* 380 McAllaster Road Stewartstown, NH 03576
David Schrier Represented by: Alan Robert Baker Attorney at Law 481 Meriden Hill Rd. Columbia NH 03590 abobbaker@aol.com	*no internet – serve to Brad & Daryl Thompson
Robert R. Martin Emergency Management Director, Clarksville, NH; Emergency Coordinator, Coos County New Hampshire, ARES 14 Tower Road Clarksville, NH 03592 ibis@pipeline.com	Dixville Notch—Harvey Swell Location Marty Kaufman, John Petrofsky and Bradley J. Thompson 599 Noyes Road Stewartstown, NH 03576 bjtddt@gmail.com
Roderick Moore, Jr. Joseph John Dunlap Shawn Patrick Brady Christopher Thompson Represented by: Alan Robert Baker Attorney at Law 481 Meriden Hill Rd. Columbia NH 03590 abobbaker@aol.com	E Martin Kaufman, M.D., Janice Kaufman, Herman Lerner, M.D., Arthur Weinstein BEAR ROCK Stewartstown, NH jpetrofsky@googlemail.com

Abutting Property Owners (overhead portion), Dummer, Stark, and Northumberland

R. Eric & Margaret J. Jones John Silver Road Northumberland, NH legacyforest@gmail.com	Susan E Percy Percy Summer Club 275 Summer Club Road Stark, NH 03582 Susanenderspercy@gmail.com

Northern Pass Transmission LLC and Public Service Company of New Hampshire dba Eversource Energy
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Master Service List
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Atty. Arthur Cunningham, Representing Kevin Spencer & Mark Legasse PO Box 511 Hopkinton, NH 03229 gilfavor@comcast.net Kevin Spencer 161 Sullivan Road Stark, NH 03582-6451 Kkspencerbwi161@gmail.com	Robert Heath PO Box 144 76 Potter Road Stark, NH
Elaine & Eric Olson Represented by: Alan Robert Baker Attorney at Law 481 Meriden Hill Rd. Columbia NH 03590 abobbaker@aol.com	Joshua Olson Represented by: Alan Robert Baker Attorney at Law 481 Meriden Hill Rd. Columbia NH 03590 abobbaker@aol.com
Rodrigue & Tammy Beland Represented by: Alan Robert Baker Attorney at Law 481 Meriden Hill Rd. Columbia NH 03590 abobbaker@aol.com	

Abutting Property Owners (overhead portion), Whitefield, Dalton, and Bethlehem

Elmer and Claire Lupton 75 Newell Lane Whitefield, NH 03598	Mary Boone Wellington mary@rosecottagenorth.com
Bruce and Sondra Brekke 99 Ramble On Road Whitefield NH 03598 straynge.bru@gmail.com	James and Judy Ramsdell 1049 Whitefield Road Dalton, NH jamesramsdell@yahoo.com
Charles and Cynthia Hatfield 41 Hatfield Drive Whitefield, NH 03598 c1oldhat@yahoo.com	Donald & Betty Gooden 76 Lancaster Rd. Whitefield, NH 03598
Tim and Brigitte White brigwhite1@gmail.com	David Van Houten 649 Cherry Valley Rd Bethlehem, NH 03574 davidgvanhouten@gmail.com

Non-Abutting Property Owners (overhead portion), Stark, Lancaster, Whitefield, Dalton, and Bethlehem

Northern Pass Transmission LLC and Public Service Company of New Hampshire dba Eversource Energy
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Master Service List
Site 102.47, 202.07

Mark W. Orzeck and Susan Orzeck 90 Ridgeline Drive Westport, MA 02790 Mark.Orzeck@htproducts.com	John Davidge Prospect Farm-Lancaster LLC 56 Mt. Prospect Road Lancaster, NH 03584-3304 JWD@DavidgeCo.com
Linda Upham-Bornstein 185 Mount Prospect Rd. Lancaster, NH 03584 lubornstein@gmail.com	Timothy T. More, Esq., on behalf of Weeks Lancaster Trust 50 South Main St., Providence, RI 02903 timmore@tmorelaw.com rsmore47@gmail.com
Richard M. McGinnis 352 North Road Lancaster, NH peter@pwpre.com	Frederic P. Fitts 22 Knothole Rd. Whitefield, NH 03598 tfitts@bu.edu
Gerald and Vivian Roy 178 Forest Lake Road Whitefield, NH 03598 swobbyjrroy@hotmail.com	Edward Piatek 129 Elm Street Whitefield snowghost54@gmail.com
Frank and Kate Lombardi 101 Elm St. Whitefield, NH fmlombardi5@hotmail.com	Marsha Lombardi 111 Elm Street Whitefield, NH 03598 fmlombardi5@hotmail.com
Wendy Doran 91 Twin Mountain Rd Whitefield NH 03598 poboxshay@gmail.com	Alexandra and James Dannis 117 McGinty Road Dalton, NH sandydannis@gmail.com
Andrew D. Dodge, Esq. 2 Central Green Winchester, MA 01890 andrew-dodge@verizon.net	Joseph Keenan jtkphd@gmail.com

Abutting Property Owners (underground portion), Bethlehem to Plymouth

Nigel Manley and Judy Ratzel The Rocks Estate 2 Christmas Lane Bethlehem, NH 03574 manley1515@gmail.com	Russell and Lydia Cumbee 1719 Easton Road Franconia, NH 03580 russlydia@myfairpoint.net
Walter Palmer and Kathryn Ting 1900 Easton Rd. Franconia, NH 03580 waltpalmer1@gmail.com kpalmer2005@gmail.com	Peter and Mary Grote 1437 Easton Road Franconia, NH petergrote@mac.com

Northern Pass Transmission LLC and Public Service Company of New Hampshire dba Eversource Energy
SEC 2015-06
Master Service List
Site 102.47, 202.07

Paul and Dana O'Hara 68 Church Street Franconia, NH 03580 dohara@littletonschools.org	Virginia Jeffryes 92 Church St PO Box 577 Franconia, NH 03580 vjeffryes@hotmail.com
Ken & Linda Ford 257 Main Street, PO Box 728 Franconia, NH 03580	
Campbell McLaren 50 Gibson Road Easton, NH 03580 gpcmclaren@gmail.com	Eric and Barbara Meyer 791 Easton Valley Road Easton NH 03580 bnmeyer7@gmail.com
Robert W. Thibault Rt. 116 Easton, NH rwtbo@yahoo.com	Dennis Ford PO Box 544 1544 Easton Valley Road Easton NH 03580 daford65@yahoo.com
Carl and Barbara Lakes 18 Loop Road Easton, NH carllakes54@gmail.com	Bruce Ahern 503 Daniel Webster Highway Plymouth, NH bruceahern@roadrunner.com
Frank Pinter 32 Academy Street Unit 14 PO Box 498 Franconia, NH fpinter@gmail.com	

Non-Abutting Property Owners (underground portion), Bethlehem to Plymouth

Lee Sullivan & Stephen Buzzell 10 Burnham School Road Arundel Maine 04046 leesullivan@stevebuzzell.com	Timothy and Rebecca Burbank, Edward Cenerizio, Deborah Corey and Matthew Steele 41 Dyke Road LLC northpack99@yahoo.com
James H Page Jr. 67 South Rd. Deerfield, NH 03037 jpge@metrocast.net	Susan Schibanoff P.O. Box 59 Franconia, NH 03580 Susan.schibanoff@unh.edu

Abutting Property Owners (overhead portion), Deerfield

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Erick and Kathleen Berglund 23 Nottingham Road Deerfield, NH 03037 erickb@metrocast.net	Rebecca Hutchinson 30 Lang Road Deerfield, NH rebec47@gmail.com
Torin and Brian Judd 96-A Mount Delight Road Deerfield, NH Torin.judd@gmail.com	Jo Anne Bradbury 30 Thurston Pond Road Deerfield, NH 03037 jabradbury@myfairpoint.net
Menard Forest Family LP Jeanne Menard 36 Mountain Road Deerfield, NH 03037 Jeanne@paradeproperties.net	Kevin Cini 20 Mountain Road Deerfield NH, 03037 keliscini@gmail.com
Bruce Adami & Robert Cote 32 Mountain Road Deerfield, NH 03037 Bob.cote@yahoo.com	Eric and Sandra Lahr 11 North Rd. Deerfield NH 03037

Abutting Property Owners (overhead portion), Ashland, Northfield, Canterbury, Allenstown, and Concord

Carol L. Currier 70 Cedar Lane P.O. Box 34 Ashland, NH 03217 Clcurrier65@gmail.com	Mary A. Lee 93 Fiddler's Choice Rd Northfield NH 03276 Sukkha@metrocast.net
Craig and Corinne Pullen Windswept Farm, LLC 63 Old Schoolhouse Road Canterbury, NH 03224 corinne.pullen@yahoo.com	Stephen J. Judge, Esq. Wadleigh, Starr & Peters, P.L.L.C 95 Market Street Manchester, NH 03101 sjudge@wadleighlaw.com
Taras W. and Marta M. Kucman 12 Brookwood Drive Concord, NH tkucman@gmail.com	Kelly Normandeau Concord Equestrian Center 56 Sanborn Rd Concord, NH 03301 knorm2012@gmail.com
Laura M. Bonk 21 Tahanto St. Concord, NH 03301 laurambonk@gmail.com	Michelle Kleindienst Association Manager McKenna's Purchase Unit Owner's Assoc. kleindienstm@gmail.com

Limited Intervention

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Philip H. Bilodeau Joan C. Bilodeau 140 Nottingham Road Deerfield, NH 03037 jbminey@gmail.com Scott E. Hogan The Law Office of Scott E. Hogan P.O. Box 33 Durham, NH 03824 hoganlaw@comcast.net	Bruce F. Anderson, Esq. New England Power Generators Association 33 Broad Street, 7th Floor Boston, MA 02109 banderson@nepga.org

Non-Abutting Property Owners (overhead portion) Ashland to Deerfield

Joanna and Robert Tuveson 105 Sargent Road Holderness, NH 03245 roberttuveson@hotmail.com	Elisha Gray 809 Blake Hill Road New Hampton, NH 03256 yarge@comcast.net
Rodney and Laura Felgate 766 Blake Hill Road New Hampton, NH 03256 rodneyfelgate@gmail.com	Ellen Faran for the Webster Family 1868 River Road Bridgewater, NH 03264 ewfaran@gmail.com Charlotte Crane ccrane@law.northwestern.edu
Lawrence and Maxine Phillips 23 Mountain View Drive Canterbury, NH 03224	Lisa Wolford and Pamela Hanglin 14 Church Street (formerly Old Center Road South) Deerfield, NH 03037 wolfordnh@gmail.com
Maureen Quinn 47A Nottingham Road Deerfield, NH 03037 fmquinn59@gmail.com	Madelyn and Thomas Foulkes 26 Nottingham Road Deerfield, NH 03037 tfoulkes9@gmail.com
Pawtuckaway View, LLC Jeanne Menard 36 Mountain Road Deerfield, NH 03037 Jeanne@paradeproperties.net	

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Non-Governmental Organizations

Society for the Protection of New Hampshire Forests BCM Environmental & Land Law, PLLC Amy Manzelli 3 Maple Street Concord, NH 03301 manzelli@nhlandlaw.com	BCM Environmental & Land Law, PLLC Jason Reimers 3 Maple Street Concord, NH 03301 reimers@nhlandlaw.com
Thomas Masland Ransmeier & Spellman PC One Capitol Street Concord, NH 03302 tmasland@ranspell.com	BCM Environmental & Land Law, PLLC Elizabeth Boepple 3 Maple Street Concord, NH 03301 boepple@nhlandlaw.com
BCM Environmental & Land Law, PLLC Stephen Wagner 3 Maple Street Concord, NH 03301 wagner@nhlandlaw.com	Ammonoosuc Conservation Trust Douglas Evelyn, Secretary, ACT Board of Trustees 53 Post Road Sugar Hill, NH 03586 develyn1@myfairpoint.net
Appalachian Mountain Club Susan Arnold, VP for Conservation 5 Joy Street Boston, MA 02108 sarnold@outdoors.org	New Hampshire Sierra Club Catherine M. Corkery, Chapter Director Field Organizer 40 North Main St., 2nd Floor Concord, NH 03301 catherine.corkery@sierraclub.org NHSC603@gmail.com
William L. Plouffe DrummondWoodsum 84 Marginal Way Portland, ME 04101-2480 wplouffe@dwmlaw.com	Dr. Kenneth Kimball Director of Research, AMC kkimball@outdoors.org
Aladdine Joroff Harvard Law School ajoroff@law.harvard.edu	NH Preservation Alliance Jennifer Goodman, Director PO Box 268 Concord, NH 03302 jg@nhpreservation.org
Conservation Law Foundation Melissa Birchard mbirchard@clf.org	New Hampshire Preservation Alliance and National Trust for Historic Preservation The Watergate Office Building 2600 Virginia Avenue NW Suite 1100 Washington, DC 20037 SWilliamson@savingplaces.org emerritt@savingplaces.org

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Conservation Law Foundation Johanne S. Van Rossum jvanrossum@clf.org	Sugar Hill Historical Museum Nancy Martland 16 Post Road Sugar Hill, NH nancy.martland@gmail.com
North Country Scenic Byways Council Carl D. Martland, Chair 16 Post Road Sugar Hill, NH, 03586 martland@mit.edu	

Businesses & Organizations with Economic Interests

Cate Street Capital, Inc. Dammon Frecker One Cate Street, Suite 100 Portsmouth, NH dfrecker@cateops.com	IBEW Brian Murphy 22 Old Concord Turnpike Barrington, NH 03825 murphy@ibew104.org
Coos County Business and Employers Group Bianco Professional Association James Bianco 18 Centre St. Concord, NH 03301 jbianco@biancopa.com Jason Dennis jdennis@biancopa.com	North Country Chamber of Commerce Britni White, Executive Director P.O. Box 1 104 Main Street, Suite 206 Colebrook, NH 03576 info@chamberofthenorthcountry.com
Dixville Capital, LLC and Balsams Resort Holdings, LLC Mark Belliveau Pierce Atwood Pease International Tradeport One New Hampshire Ave., 350 Portsmouth, NH 03801 mbeliveau@pierceatwood.com	

Wagner Forest Management, LTD Mike Novello 150 Orford Road, PO Box 160 Lyme, NH 03768 mnovello@wagnerforest.com	Pemigewasset River Local Advisory Committee Max E. Stamp, Chair 2110 Summer St Bristol, NH 03222 hmstamp@metrocast.net